No. 15156

United States Court of Appeals

for the Ninth Circuit

R. H. PHILLIPS and JESSIE E. PHILLIPS, his wife, R. R. HAGGERTY and WINNIE HAGGERTY, his wife and D. EVERETT PHILLIPS and EVELYN PHILLIPS, his wife, individually and in behalf of the Cold Creek Company, a partnership, Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeals from the United States District Court
for the Eastern District of Washington,
Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —9-6-56

No. 15156

United States
Court of Appeals
for the Ninth Circuit

R. H. PHILLIPS and JESSIE E. PHILLIPS, his wife, R. R. HAGGERTY and WINNIE HAGGERTY, his wife and D. EVERETT PHILLIPS and EVELYN PHILLIPS, his wife, individually and in behalf of the Cold Creek Company, a partnership, Appellants,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

RONALD R. HULL,
Assistant United States Attorney,
222 Federal Building,
Yakima, Washington,

Attorney for Plaintiff-Appellee.

WALTER V. SWANSON,
Larson Building,
Yakima, Washington,

Attorney for Defendants-Appellants.

In the United States District Court for the Eastern District of Washington, Southern Division

Civil No. 452

UNITED STATES OF AMERICA,

Petitioner,

vs.

6,007.89 ACRES OF LAND, MORE OR LESS, Situate in Yakima County, Washington, and R. R. HAGGERTY, et al.,

Defendants.

DECLARATION OF TAKING

To the Honorable, the United States District Court:

I, Gordon Gray, Secretary of the Army of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (26 Stat. 357; 40 U.S.C. Sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U.S.C. Sec. 171) which Acts authorize the acquisition of land for military or other war purposes and the Act of Congress approved October 29, 1949 (Public Law 434—81st Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for an artillery range and for training and maneuver area for troops. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Fort Lewis Artillery Range, Yakima and Kittitas Counties, Washington, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is a term for years commencing January 1, 1950 and ending June 30, 1950, extendible for yearly periods thereafter until June 30, 1955, at the election of the United States, notice of which election shall be filed in this proceeding at any time prior to the end of the term hereby taken or subsequent extensions thereof, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof any and all improvements and structures placed thereon by or for the United States.

4. A plan showing the lands taken is annexed

hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands for the period commencing January 1, 1950 and ending June 30, 1950 is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of the said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the ...., by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said Gordon Gray, Secretary of the Army, this the 13th day of January, A.D. 1950, in the City of Washington, District of Columbia.

/s/ GORDON GRAY,
Secretary of the Army of the United States

SCHEDULE "A"

The land which is the subject matter of this declaration of taking aggregates 6,007.89 acres of land, more or less, situate and being in the County of Yakima, State of Washington. A description of the lands taken, together with the names of the purported owners thereof, and a statement of the gross sum estimated to be just compensation there-

for for the period ending June 30, 1950, is as follows:

Tract No. C-240

The west half of Section 3; all of Sections 4, 5 and 9; the west half of Section 10; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 2566.69 acres, more or less.

Tract No. C-241

All of Section 17; the north half and the north half of the southwest quarter of Section 20; the north half and the north half of the south half of Section 21; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 1520 acres, more or less.

Names of Purported Owners of Tracts C-240 and C-241: 1. R. R. Haggerty and Winnie Haggerty, his wife; 2. R. H. Phillips and Jessie E. Phillips, his wife; 3. D. Everrett Phillips and Evelyn Phillips, his wife.

Addresses of Purported Owners: 1. Lind, Washington; 2. Lind, Washington; 3. Lind, Washington.

Estimated Compensation: $842.50.

Tract No. C-261

All of Section 8, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 640 acres, more or less.

Names of Purported Owners: Vera V. Taylor and Leslie W., her husband.

Address of Purported Owners: Route 5, Box 129, Yakima, Washington.

Estimated Compensation: $48.00.

Tract No. C-277

All of Section 29; the north half of Section 32; the north half of Section 31; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 1281.20 acres, more or less.

Names of Purported Owners: Simon Martinez and Kathleen Martinez, his wife.

Address of Purported Owners: Sunnyside, Washington.

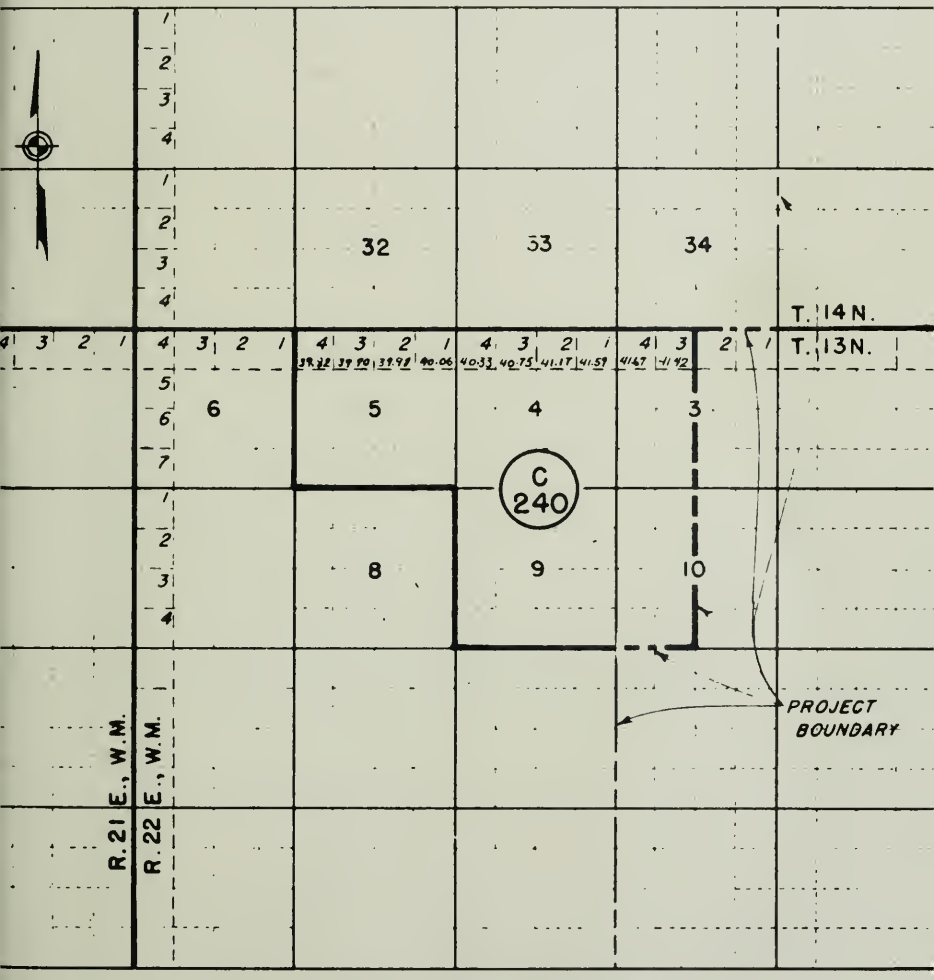
Estimated Compensation: $440.50.

The amount of money estimated by the acquiring authority to be just compensation for the estate hereby taken, inclusive of all rights set forth in the declaration of taking, is One Thousand Three Hundred Thirty-One and No/100 Dollars ($1,331.00).

[Endorsed]: Filed February 10, 1950.

TRACT MAP (WITH GRID)

oject symbol No. Fort Lewis Artillery Range Tract No. C 240
me of owner R.H. Phillips, et al
ld work by _____ Date _____
scription of tract: W² section 3; all sections 4, 5 and 9; W² section 10, township 13 north, range 22 east, W.M., Yakima County, Washington.



CLASSES OF LAND

p land _____
sture land _____
rest land _____
des of each class of land must be wn on the map proper
lame of any other class of land olved.

Scale 1 inches equals 1 mile

I certify that this is an accurate map of tract C240 based on DEED DESCRIPTION which shows this tract to contain 2566.69 acres, more or le
Name Chelmeka M Burr
Title Draftsman, Carto.
Date 31 March 1944
Indicate whether map is based on general land offic records, aerial survey, deed description or actual survey

SCHEDULE "B"

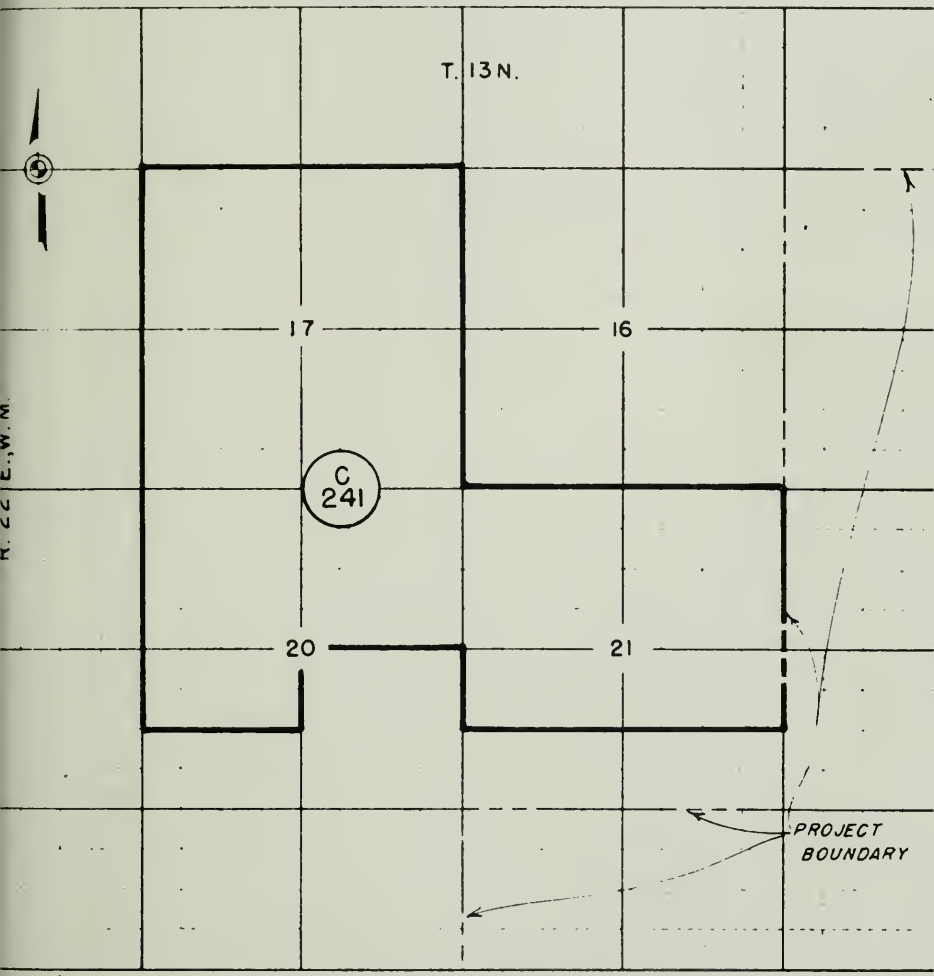
TRACT MAP (WITH GRID)

bject symbol No Fort Lewis Artillery Range Tract No C 241

me of owner R H Phillips, et al

eld work by Date

escription of tract Section 17; N2, N2 SW4 section 20; N2, N2 S2 section 21 all in township 13 north, range 22 east, W.M., Yakima County Washington.



Scale 2 inches equals 1 mile

CLASSES OF LAND

op land _____

sture land _____

rest land _____

_____

odes of each class of land must be own on the map proper

Name of any other class of land volved.

I certify that this is an accurate map of tract C 24 based on DEED DESCRIPTION whi shows this tract to contain 1520.00 acres, more or l

Name Chlorisha M. Baer

Title Draftsman, Cartographer

Date 31 March 1949

Indicate whether map is based on general land offi records, aerial survey, deed description or actual surve

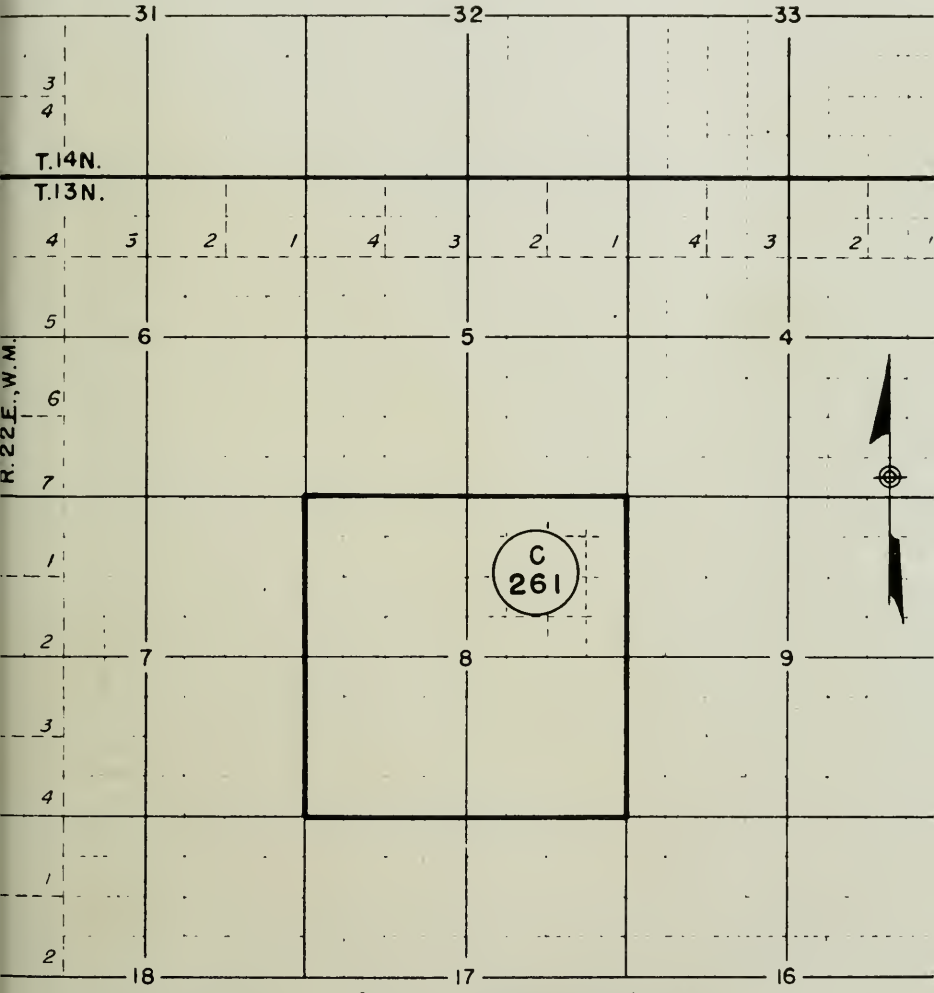
SCHEDULE "B"

Jan 46 998

TRACT MAP (WITH GRID)

10

roject symbol No Fort Lewis Artillery Range Tract No. C 261
ame of owner Vera V Taylor
eld work by _____ Date _____
escription of tract: All Section 8, T 13 N., R 22 E., W.M.,
Yakima County, Washington.



Scale 2 inches equals 1 mile

CLASSES OF LAND

rop land _____
asture land _____
orest land _____
_____

rades of each class of land must be
own on the map proper
Name of any other class of land
volved

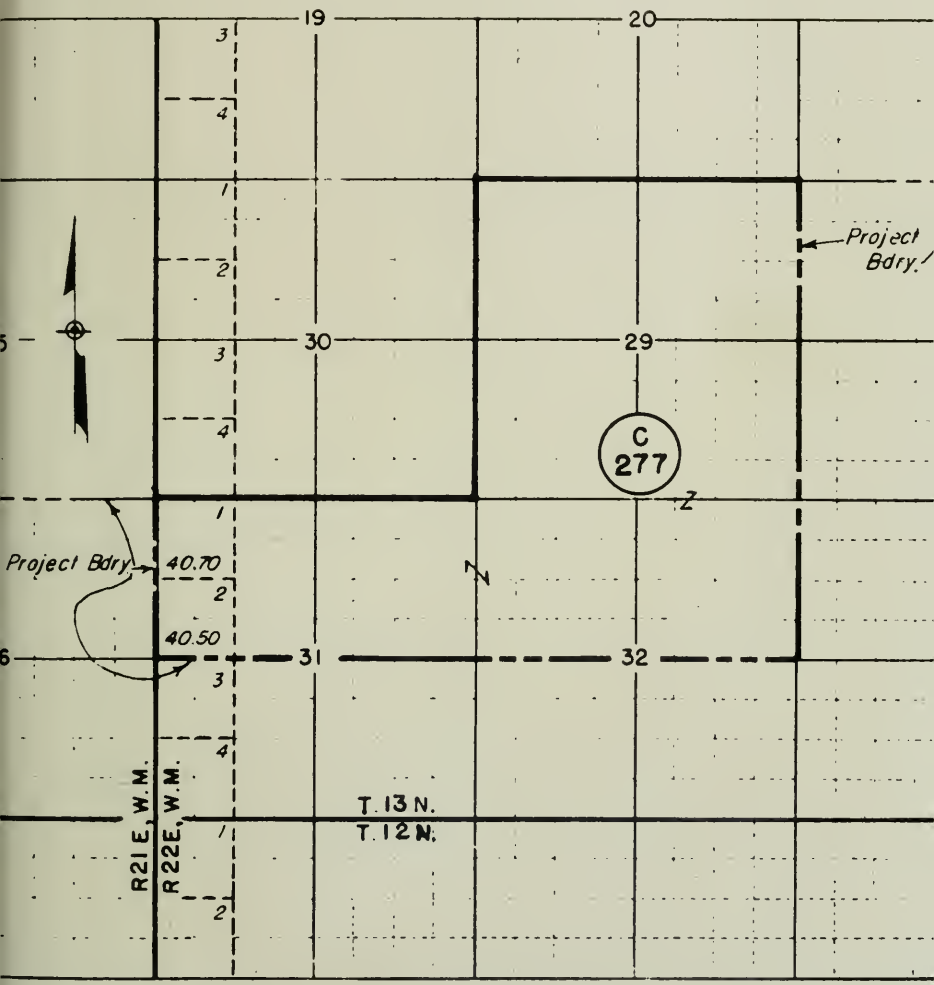
I certify that this is an accurate map of tract C 26
based on DEED DESCRIPTION whi
shows this tract to contain 640.00 acres, more or
Name Chelsea M. Baer
Title Draftsman
Date 20 Jan. 1949
Indicate whether map is based on general land offi
records, aerial survey, deed description or actual surve

SHEET "B"

TRACT MAP (WITH GRID)

11

Project symbol No. Fort Lewis Artillery Range Tract No. C 277
Name of owner Simon (Kathleen) Martinez
Field work by _____ Date _____
Description of tract: All of Section 29; N2 Sec. 32 and N2 Sec. 31, T. 13 N., R 22E W.M., Yakima County, Washington.



CLASSES OF LAND

Crop land _____
Pasture land _____
Forest land _____
_____

Grades of each class of land must be shown on the map proper
Name of any other class of land involved.

Scale: 2 inches equals 1 mile

I certify that this is an accurate map of tract C 2
based on DEED DESCRIPTION wh
shows this tract to contain 1281.20 acres, more or
Name Chelmesha M. Baer
Title Draftsman
Date 19 Jan. 1949
Indicate whether map is based on general land off
records, aerial survey, deed description or actual surv

SCHEDULE "B"

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for an artillery range and for a training and maneuver area for troops. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Fort Lewis Artillery Range, Yakima and Kittitas Counties, Washington, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is a term for years commencing July 1, 1950 and ending June 30, 1951 extendible for yearly periods thereafter until June 30, 1955, at the election of the United States, notice of which election shall be filed in this proceeding at any time prior to the end of the term hereby taken or subsequent extensions thereof, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof any and all improvements and structures placed thereon by or for the United States.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands for the period commencing July 1, 1950 and ending June 30, 1951 is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of the said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said Frank Pace, Jr., Secretary of the Army, this the 28th day of June, A.D. 1950, in the City of Washington, District of Columbia.

/s/ FRANK PACE, JR.,
Secretary of the Army

SCHEDULE "A"

The land which is the subject matter of this declaration of taking aggregates 6,849.52 acres of land, more or less, situate and being in the County of Yakima, State of Washington. A description of the lands taken, together with the names of the purported owners thereof, and a statement of the gross sum estimated to be just compensation therefor, for the period ending June 30, 1951, is as follows:

Tract No. C-230

The northwest quarter of Section 32, Township 14 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 160 acres, more or less.

Name of Purported Owner: Ragnar L. Arnesen.

Address of Purported Owner: 3746 West Point, Dearborn, Michigan.

Estimated Compensation: $30.00.

Tract No. C-233

The southeast quarter of Section 32, Township 14 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 160 acres, more or less.

Names of Purported Owners: Stanley E. Stewart and Dorothy J. Stewart, his wife.

Address of Purported Owners: 3422 N. E. Klickitat Street, Portland, Oregon.

Estimated Compensation: $30.00.

Tract No. C-247

Lot 4; and the southwest quarter of the northwest quarter of Section 4, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 79.39 acres, more or less.

Names of Purported Owners: Eva Skinner and Henry V. Skinner, her husband.

Address of Purported Owners: 506 South Rose Street, Kalamazoo, Michigan.

Estimated Compensation: $15.00.

Tract No. C-241 A

The north half and the north half of the south half of Section 19; all of Section 18; the east half and the east half of the west half of Section 7; all except Lot 4 of Section 6; all in Township 13 North, Range 22 East of the Williamette Meridian; and the east half and the east half of the west half of Section 31, Township 14 North, Range 22 East of the Willamette Meridian; all in Yakima County, Washington.

The land above described contains 2,714.84 acres, more or less.

Tract No. C-259

The west half of Section 12, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 320 acres, more or less.

Names of Purported Owners of Tracts C-241 A and C-259: R. H. Phillips, et al., partners d.b.a. Phillips Haggerty Livestock Company.

Address of Purported Owners: Lind, Washington.

Estimated Compensation: $910.00.

Tract No. C-275

The south half of the south half of Section 19, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 162.05 acres, more or less.

Tract No. C-280

All of Section 25, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 640 acres, more or less.

Tract No. C-281

The east half of Section 26, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 320 acres, more or less.

Names of Purported Owners of Tracts C-275, C-280 and C-281: Simon Martinez and Kathleen Martinez, his wife.

Address of Purported Owners: Sunnyside, Washington.

Estimated Compensation: $280.00.

Tract No. C-243

The southwest quarter of Section 2, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 160 acres, more or less.

Name of Purported Owner: Alva K. Wilson.

Address of Purported Owner: 106 West 10th Street, McMinnville, Oregon.

Estimated Compensation: $30.00.

Tract No. C-246

Lot 3 and the southeast quarter of the northwest quarter of Section 4, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 79.27 acres, more or less.

Names of Purported Owners: 1. Bertha Tabbat; 2. Grace Lyche; 3. Myrtle Miller; 4. Nina Carpenter Whitted; 5. Samuel H. Simmons; 6. Pearl M. Summers; 7. Fay Simmons; 8. Day Simmons; 9. Lena J. Fewless; 10. Fred Simmons; 11. Freda Carpenter; 12. Lester W. Carpenter; 13. Martha Carpenter.

Address of all Purported Owners: c/o Harcourt M. Taylor, Attorney, Liberty Building, Yakima, Washington.

Estimated Compensation: $10.00.

Tract No. C-279

The south half of the north half of Lot 4 and the north half of the south half of Lot 4 in Section 30, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 20.47 acres, more or less.

Names of Purported Owners: 1. Richard William Strawhun; 2. Pauline Mehner.

Addresses of Purported Owners: 1. Charlotte Avenue South and Preble, Bremerton, Washington; 2. Charlotte Avenue South and Preble, Bremerton, Washington.

Estimated Compensation: $5.00.

Tract No. C-253

The east half of the northeast quarter of Section 8, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 80 acres, more or less.

Name of Purported Owner: Charles W. Camp.

Address of Purported Owner: 336 Ocean Center Building, Long Beach, California.

Estimated Compensation: $15.00.

Tract No. C-258

The north half of the southeast quarter; and the southeast quarter of the southeast quarter of Section 10, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 120 acres, more or less.

Names of Purported Owners: 1. Ruie Hartman; 2. William Clarence Buckley; 3. Jennie A. Pfingstay; 4. Coral F. Buckley.

Addresses of Purported Owners: 1. Selah, Washington; 2. 654 S. W. Grant, Portland, Oregon; 3. Selah, Washington; 4. 319 North 21st Avenue, Yakima, Washington.

Estimated Compensation: $20.00.

Tract No. C-264

The northeast quarter of Section 14, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 160 acres, more or less.

Names of Purported Owners: Bernadine A. Bittner and Henry J. Ditter, partners d.b.a. Bittner & Ditter.

Address of Purported Owners: 613 Voltaire Avenue, Yakima, Washington.

Estimated Compensation: $30.00.

Tract No. C-265

The east half of the northwest quarter of Section 14, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 80 acres, more or less.

Name of Purported Owner: Elmer L. Mulhern.

Address of Purported Owner: 2831 Balboa Street, San Francisco 21, California.

Estimated Compensation: $15.00.

Tract No. C-270

The south half of Section 17, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 320 acres, more or less.

Tract No. C-271

All of Section 19, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 633.50 acres, more or less.

Tract No. C-272

All of Section 21, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 640 acres, more or less.

Names of Purported Owners of Tracts C-270, C-271 and C-272: Ona B. Jarvis and George W. Jarvis, her husband.

Address of Purported Owners: c/o Wyalta Oil Company, Casper, Wyoming.

Estimated Compensation: $400.00.

The amount of money estimated by the acquiring authority to be just compensation for the estate hereby taken, inclusive of all rights set forth in the declaration of taking, is One Thousand Seven Hundred Ninety and No/100 Dollars ($1,790.00).

[Endorsed]: Filed July 17, 1950.

In the United States District Court for the Eastern District of Washington, Southern Division

Civil Action No. 762

UNITED STATES OF AMERICA,
Plaintiff,

vs.

6,868.22 ACRES OF LAND, MORE OR LESS, in Yakima County, Washington; R. H. Phillips and Jessie E. Phillips, his wife; R. R. Haggerty and Winnie Haggerty, his wife; D. Everrett Phillips, also known as D. Everett Phillips, and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company; Yakima County, Washington, a municipal corporation; and Unknown Owners. Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved August 1, 1888 (26 Stat. 357; 40 U.S.C. Sec. 257), and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50

U.S.C. Sec. 171) which Acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved July 10, 1952 (Public Law 488—82nd Congress), which Act appropriated funds for such purposes.

3. The use for which the property is to be taken is for military purposes.

4. The interest to be acquired in the property is a term for years commencing October 28, 1952, and ending on June 30, 1953, extendible for yearly periods thereafter at the election of the United States, until June 30, 1957, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term taken, or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term taken, or any extensions thereof, any and all improvements and structures placed thereon by or for the United States, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is described in Exhibit "A" hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

Tracts C-205, C-209 and C-219

R. H. Phillips and Jessie E. Phillips, his wife;

R. R. Haggerty and Winnie Haggerty, his wife;

D. Everrett Phillips, also known as D. Everett Phillips, and Evelyn Phillips, his wife;

R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company;

Yakima County, Washington, a municipal corporation.

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners".

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

/s/ HARVEY ERICKSON,
United States Attorney

/s/ HART SNYDER,
Special Attorney, Dept. of Justice
Attorneys for Plaintiff

Trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ HARVEY ERICKSON,
United States Attorney

/s/ HART SNYDER,
Special Attorney, Dept. of Justice

EXHIBIT "A"

Tract C-205

All of Section 5, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 628.22 acres, more or less.

Tract C-209

All of Section 9, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 640.0 acres, more or less.

Tract C-219

All of Sections 15, 17, 21, 27, 28, 29 and 33 in Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Section 20, Except the north half of the northeast quarter thereof; and all of Section 22, Except the north half of the northwest quarter thereof; all in said township and range.

The tract of land above described contains 5600.0 acres, more or less.

[Endorsed]: Filed December 17, 1952.

In the United States District Court for the Eastern District of Washington, Southern Division

Civil No. 892

UNITED STATES OF AMERICA, Plaintiff,

vs.

33,213.13 ACRES OF LAND, MORE OR LESS, Situate in the County of Yakima, State of Washington, and R. H. Phillips and Jessie E. Phillips, his wife; R. R. Haggerty and Winnie Haggerty, his wife; D. Everett Phillips, also known as D. Everrett Phillips, and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company; Walter V. Swanson and Marjorie T. Swanson, his wife; R. H. Phillips and Jessie E. Phillips, R. R. Haggerty and Winnie Haggerty, D. Everett Phillips and Evelyn Phillips, Walter V. Swanson and Marjorie T. Swanson, a partnership doing business as Cold Creek Company; Northern Pacific Railway Company, a corporation; Shell Oil Company, a corporation; Laurent Regimbal and Jane Doe Regimbal, his wife; Yakima County, Washington, a municipal corporation; The Unknown Heirs of any of the above named persons, if deceased; Also, All Other Persons, Parties, Firms or Corporations Unknown having or claiming any right, title, estate, lien or interest in or to the land described in the complaint herein, or any portion thereof, Defendants.

COMPLAINT

Comes Now the United States of America, by the undersigned attorneys, acting under and by direction of the Attorney General of the United States and alleges as follows:

1. This is an action of a civil nature brought by the United States of America at the request of the Army of the United States for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C., Sec. 171), which acts authorize the acquisition of land for military purposes, and the Act of Congress approved January 6, 1951 (Public Law 911—81st Congress), which Act appropriated funds for such purposes.

3. The use for which the property is to be taken is that of the United States of America and for public uses and said lands are being acquired under the direction of the Acting Secretary of the Army of the United States; that the said property is necessary adequately to provide for an artillery range and for a training and maneuver area for troops; that said property has been selected by the Acting Secretary of the Army of the United States for use in connection with the establishment of the Yakima Artillery and Anti-Aircraft Firing Range,

Yakima and Kittitas Counties, Washington, and for such other uses as may be authorized by the Congress of the United States or by Executive Order.

4. The interest to be acquired in the property is the fee simple title thereto, subject to existing easements for public roads and highways, for public utilities, for railroads and pipe lines.

5. The property so to be taken in these proceedings is situate in Yakima County, Washington, and in the above designated district and division and is described in Schedule "A" hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are, as follows:

Tracts C-205, C-209, C-219

R. H. Phillips and Jessie E. Phillips, his wife; R. R. Haggerty and Winnie Haggerty, his wife; D. Everett Phillips and Evelyn Phillips, his wife; Phillips, Haggerty Livestock Company, a partnership; Walter V. Swanson and Marjorie T. Swanson, his wife; Cold Creek Company, a partnership; Shell Oil Company, a corporation; Laurent Regimbal and Jane Doe Regimbal, his wife; Yakima County, Washington, a municipal corporation.

Tracts C-240, C-286, C-241, F-509, F-573, F-574, F-524, F-575, F-576, F-577, F-526, F-529, F-578, F-579, F-580, F-558, C-241-A, C-259

R. H. Phillips and Jessie E. Phillips, his wife;

R. R. Haggerty and Winnie Haggerty, his wife; D. Everett Phillips and Evelyn Phillips, his wife; Phillips, Haggerty Livestock Company, a partnership; Walter V. Swanson and Marjorie T. Swanson, his wife; Cold Creek Company, a partnership; Northern Pacific Railway Company, a corporation; Shell Oil Company, a corporation; Laurent Regimbal and Jane Doe Regimbal, his wife; Yakima County, Washington, a municipal corporation.

7. Yakima County, a municipal corporation of the State of Washington, may have or claim an interest in the property aforesaid by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to the plaintiff, and such persons are made parties to the action, under the designation "Unknown Owners".

9. That simultaneously with the filing of this petition, there has been filed in the above designated court and cause and as a part of this proceeding, declarations of taking covering the within described property, and that there has been deposited simultaneously therewith in the registry of the court a sum of money estimated to be just compensation for the taking of said property, to-wit, the sum of Four Hundred Thirteen Thousand and no/100 Dollars ($413,000.00).

Wherefore the plaintiff demands judgment that the property be condemned and that just compensa-

tion for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

/s/ WILLIAM B. BANTZ,
United States Attorney
/s/ RONALD R. HULL,
Asst. United States Attorney
Attorneys for Plaintiff

Trial by jury of the issue of just compensation is demanded by plaintiff.

EXHIBIT "A"

Tract C-205

All of Section 5, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 628.22 acres, more or less.

Tract C-209

All of Section 9, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 640.0 acres, more or less.

Tract C-219

All of Sections 15, 17, 21, 27, 28, 29 and 33 in Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Section 20, Except the north half of the northeast quarter thereof; and all of Section 22,

Except the north half of the northwest quarter thereof; all in said township and range.

The tract of land above described contains 5600.0 acres, more or less.

Tract C-240

Sections 4, 5 and 9 and the west half of Section 10, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 2243.6 acres, more or less.

Tract C-241

All of Section 17; the north half and the north half of the southwest quarter of Section 20; the north half and the north half of the south half of Section 21; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 1520.0 acres, more or less.

Tract C-241-A

The following described lands in Yakima County, Washington: The east half, and the east half of the west half of Section 31, Township 14 North, Range 22 East of the Willamette Meridian.

All of Section 6, Except Government Lot 4; the east half, and the east half of the west half of Section 7; all of Section 18; and the north half and the north half of the south half of Section 19; all in Township 13 North, Range 22 East of the Willamette Meridian.

The tract of land above described contains 2714.84 acres, more or less.

Tract C-259

The west half of Section 12, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 320.0 acres, more or less.

Tract C-286

The west half of Section 3, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 323.09 acres, more or less.

Tract F-509

All of Sections 19, 29 and 31, and the south half of Section 30; all in Township 14 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Sections 13, 14, 23, 24, 25 and 35; and that part of Section 26 described as follows:

The west half of the northwest quarter;
The north half of the southwest quarter;
The southeast quarter of the southwest quarter;
The west half of the southeast quarter; and
The southeast quarter of the southeast quarter;

All in Township 14 North, Range 22 East of the Willamette Meridian, in said Yakima County.

The tract of land above described contains 6289.5 acres, more or less.

Tract F-524

All of Section 5, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 645.38 acres, more or less.

Tract F-526

The east half of Section 10; all of Sections 11, 12, 13, 14 and 15; and the north half of Section 23; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Section 7, Township 13 North, Range 23 East of the Willamette Meridian, in said Yakima County.

The tract of land above described contains 4479.0 acres, more or less.

Tract F-529

All of Sections 15, 21, 22 and 27 in Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 2560.0 acres, more or less.

Tract F-558

The northeast quarter; the north half of the northwest quarter; and the southwest quarter of the northwest quarter; all in Section 22, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 280.0 acres, more or less.

Tract F-573

The east half of Section 3, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 322.1 acres, more or less.

Tract F-574

All of Section 1, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 643.40 acres, more or less.

Tract F-575

The north half of Section 9, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 320.0 acres, more or less.

Tract F-576

The north half and the north half of the south half of Section 24, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Sections 19 and 20; the south half of the southwest quarter of Section 17; and all of Section 18, Except Government Lots 2 and 4 and the southeast quarter of the northeast quarter and the southeast quarter of the southwest quarter; all in Township 13 North, Range 23 East of the Willamette Meridian, in said Yakima County.

The tract of land above described contains 2324.0 acres, more or less.

Tract F-577

The south half of the northwest quarter; the northwest quarter of the northwest quarter; and the southwest quarter of the northeast quarter of Section 28, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 160.0 acres, more or less.

Tract F-578

The south half of Section 9, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 320.0 acres, more or less.

Tract F-579

The north half of Section 29, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 320.0 acres, more or less.

Tract F-580

All of Section 17, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington, Except the south half of the southwest quarter thereof.

The tract of land above described contains 560.0 acres, more or less.

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause No. 892.]

DECLARATION OF TAKING

To the Honorable, the United States District Court:

I, John Slezak, Acting Secretary of the Army of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C., Sec. 171), which acts authorize the acquisition of land for military purposes, and the Act of Congress approved January 6, 1951 (Public Law 911—81st Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for an artillery range and for a training and maneuver area for troops. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Yakima Artillery and Anti-Aircraft Firing Range, Yakima and Kittitas Counties, Washington, and for such other uses as

may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above-entitled cause.

3. The estate taken for said public uses is the fee simple title thereto, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and pipe lines.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said lands with all buildings and improvements thereon and all appurtenances thereto and including any and all interest hereby taken in said lands is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the plaintiff, by its Acting Secretary of the Army thereunto authorized, has caused this declaration to be signed in its name by said John Slezak, Acting Secretary of the Army, this the 27th day of January, A.D. 1954, in the City of Washington, District of Columbia.

/s/ JOHN SLEZAK,
Acting Secretary of the Army

SCHEDULE "A"

The land which is the subject matter of this declaration of taking aggregates 33,213.13 acres, more or less, situate and being in the County of Yakima, State of Washington. A description of the lands taken, together with the names of the purported owners thereof and a statement of the sum estimated to be just compensation therefor, is as follows:

[Printer's Note: Attached description of lands is a duplicate of Exhibit "A" printed in full at pages 31-36 of this printed record.]

Names of Purported Owners of Tracts C-205, C-209, C-219, C-240, C-241, C-241-A, C-259, C-286, F-509, F-524, F-526, F-529, F-558, F-573, F-574, F-575, F-576, F-577, F-578, F-579 and F-580: 1. R. H. Phillips and Jessie E. Phillips, husband and wife; 2. R. R. Haggarty and Winnie Haggarty, husband and wife; 3. D. Everett Phillips, also known as D. Everrett Phillips, and Evelyn Phillips, husband and wife; 4. Phillips, Haggarty Livestock Company, a partnership; 5. Northern Pacific Railway Company, a Wisconsin corporation; 6. Coffin Sheep Company, a Washington corporation.

Addresses of Purported Owners: 1. Lind, Washington; 2. Lind, Washington; 3. Lind, Washington; 4. Lind, Washington; 5. 812 Smith Tower, Seattle 4, Washington; 6. 20 West Yakima Avenue, Yakima, Washington.

Estimated Just Compensation for Tracts C-205, C-209, C-219, C-240, C-241, C-241-A, C-259, C-286,

F-509, F-524, F-526, F-529, F-558, F-573, F-574, F-575, F-576, F-577, F-578, F-579 and F-580: Four Hundred Thirteen Thousand and No/100 Dollars ($413,000.00).

The gross sum estimated to be just compensation for the lands hereby taken is Four Hundred Thirteen Thousand and No/100 Dollars ($413,000.00).

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause No. 892.]

PETITION FOR DISMISSAL OF MINERAL RIGHTS FROM CONDEMNATION PROCEEDING

Come now the defendants, Phillips, Haggerty, et al., and respectfully petition the above entitled court and show:

1. That the defendants, Phillips, Haggerty, et al., are the owners of approximately 34,000 acres of fee land in the above captioned proceeding and other condemnation proceedings associated therewith. That all of said land under condemnation was leased to various oil companies, including Leo Oil and Shell Oil Company, prior to the filing of condemnation proceedings. That core drilling and prospecting are now being conducted on a large scale by various oil companies to the east, to the west and to the south of the subject property. That said prospecting, seismographing and core drilling are being conducted by substantial concerns such as

Standard Oil Company, Shell Oil Company, Leo Oil Company and Richfield Oil Company. That all of the subject property is in an active leasing and prospecting area.

2. That the defendants are and since the filing of the declaration of taking have been prevented from all or any kind of prospecting in said lands in order that the true value thereof be more fully extended. That the defendants are confronted with the necessary conclusion of a trial court that any value attached to the subject lands is speculative and therefore inadmissible in the trial of a condemnation proceeding other than that said lands may possibly have a value as suitable property for exploration purposes. That exploration was interrupted by the condemnor in the above entitled and associated proceedings. That the petitioners have no adequate remedy at law.

3. That noted geologists in the employ of all of the major oil companies in the area have expressed keen desire to lease said condemned property for exploratory purposes by reason of its peculiar character and geology.

4. That the condemnor at the time of and previous to the filing of declaration of taking was and is fully aware that the land in question is situate in an active leasing area, and notwithstanding said knowledge has failed and refused to make any provision for investigation of said asset either by way of preparation for trial or by way of retention of mineral rights in the condemnee whether restricted or otherwise.

Wherefore, your petitioners pray that an order be entered herein requiring the condemnor to show cause why the mineral rights in the above entitled cause should not be excluded from the condemnation proceedings under such restrictions, if necessary, as would be reasonable under the circumstance of continued operation of the area as a firing range and military sub-district of Fort Lewis, and for such other and further relief as may to the Court seem just or equitable in the premises.

/s/ WALTER V. SWANSON,
Attorney for Defendants

Duly Verified.
Acknowledgment of Service attached.
[Endorsed]: Filed May 6, 1955.

[Title of District Court and Cause No. 892.]

ORDER DENYING PETITION FOR DISMISSAL OF MINERAL RIGHTS FROM CONDEMNATION PROCEEDING

This Case having come on this day in open court upon petition of the defendants, Phillips, Haggerty, et al., for dismissal of mineral rights from the condemnation proceeding herein, and the court having considered the records and files of the cause and having heard argument of counsel and being *fully in* the premises.

It Is Hereby Ordered and Adjudged that the petition of said defendants, Phillips, Haggerty, et

al., for dismissal of mineral rights from the condemnation proceeding herein and/or restricted use thereof be and the same is hereby denied.

Dated and Entered in open court this 24th day of June, 1955.

/s/ SAM M. DRIVER,
Judge of the United States
District Court

Presented by:

/s/ RONALD R. HULL,
Assistant United States Attorney

Approved as to Form:

/s/ WALTER V. SWANSON,
Attorney for Petitioners and Defendants,
Phillips, Haggerty, et al.

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause No. 892.]

ORDER ON CONSOLIDATION OF CAUSES FOR TRIAL

The above entitled cause coming on for trial and the order of court herein entered having been stipulated and agreed to by counsel, Walter V. Swanson, appearing for the defendants Phillips, Haggerty and others, and Ronald R. Hull, Assistant United States Attorney, appearing on behalf of the plaintiff United States.

It Is Hereby Ordered that upon trial of the above entitled cause, being cause No. 892, there shall be consolidated therewith the following causes of action:

Civil No. 452: United States vs. R. R. Haggerty, et al. (leasehold).

Civil No. 488: United States vs. Ragnar L. Arneson, et al. (leasehold).

Civil No. 762: United States vs. 6,868.22 acres, Phillips-Haggerty, et al. (leasehold).

It Is Further Ordered that the pertinent data upon which issues will be founded on trial of the above entitled causes, consolidated, has been agreed and stipulated to by respective counsel as follows:

Civil No. 892 (fee)

Declaration of Taking filed February 15, 1954.

Tracts:

C-205	628.22 acres
C-209	640.00 acres
C-219	5600.00 acres
C-240	2243.6 acres
C-241	1520.0 acres
C-241A	2714.84 acres
C-259	320.0 acres
C-286	323.09 acres
F-509	6289.5 acres
F-524	645.38 acres
F-526	4479.0 acres
F-529	2560.0 acres
F-558	280.0 acres
F-573	322.1 acres
F-574	643.40 acres

Tracts:

F-575	320.0	acres
F-576	2324.0	acres
F-577	160.0	acres
F-578	320.0	acres
F-579	320.0	acres
F-580	560.0	acres
	33,213.13	acres

Civil No. 452 (leasehold)

Tracts:

C-240 (Includes C-240 and C-286 of Civil No. 892)	2566.69	acres
C-241	1520.00	acres
	4086.69	acres

Declaration of Taking filed February 10, 1950 for a term from January 1, 1950 to June 30, 1950, subject to extension.

Order for possession on Declaration of Taking, as of February 17, 1950.

Notices of extension of term filed annually to extend term to and including time of taking of fee.

Declaration of Taking on fee filed February 15, 1954 in Civil No. 892.

Civil No. 488 (leasehold)

Tracts:

C-241A	2714.84	acres
C-259	320.0	acres
	3034.84	acres

Declaration of Taking filed July 5, 1950, for a term from July 1, 1950 to June 30, 1951, subject to extension.

Order for Possession, as of July 1, 1950, entered July 8, 1950.

Notices of extension of term filed annually to extend term to and including time of taking of fee, which is February 15, 1954, (Civil No. 892).

Civil No. 762 (leasehold)

Tracts:

C-205	628.22	acres
C-209	640.0	acres
C-219	5600.0	acres
	6868.22	acres

Complaint filed December 17, 1952 for term of years from October 28, 1952 to June 30, 1953, subject to extension.

Term extended by notice to 1954.

Declaration of Taking on fee filed February 15, 1954.

Dated and Done in open court this 26th day of October, 1955.

/s/ SAM M. DRIVER,
Judge of U. S. District Court

Approved as to Form:

/s/ WALTER V. SWANSON,
Attorney for Defendants Phillips, Haggerty, et al.

/s/ RONALD R. HULL,
Attorney for Plaintiff

[Endorsed]: Filed October 26, 1955.

[Title of District Court and Cause No. 452.]

Tracts C-240, C-241

VERDICT

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (4,086.69 acres) to be $5,062.00.

/s/ LEO HAKE,
Foreman

Annual rental and severance damage:

Plaintiff's witnesses: V. J. Conner, $3,650.00; C. Marc Miller, $2,850.00.

Defendants' witnesses: Stanford L. Haney, $18,000.00; Howard Thomas, $18,000.00; J. D. Urquhart, $13,200.00.

[Endorsed]: Filed November 4, 1955.

[Title of District Court and Cause No. 488.]

Tracts C-241-A, 259

VERDICT

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages

for the leasehold taken (3,034.84 acres) to be $2,954.00.

/s/ LEO HAKE,
Foreman

Annual rental and severance damage:

Plaintiff's witnesses: V. J. Conner, $2,140.00; C. Marc Miller, $2,230.00.

Defendants' witnesses: Stanford L. Haney, $15,000.00; Howard Thomas, $15,000.00; J. D. Urquhart, $10,800.00.

[Endorsed]: Filed November 4, 1955.

[Title of District Court and Cause No. 762.]

Tracts C-205, C-209, C-219

VERDICT

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (6868.22 acres) to be $7,240.00.

/s/ LEO HAKE,
Foreman

Annual rental and severance damage:

Plaintiff's witnesses: V. J. Conner, $4,370.00; C. Marc Miller, $2,500.00.

Defendants' witnesses: Stanford L. Haney, $30,000.00; Howard Thomas, $27,000.00; J. D. Urquhart, $27,500.00.

[Endorsed]: Filed November 4, 1955.

[Title of District Court and Cause No. 892.]

VERDICT

We, the Jury in the above entitled cause, find just compensation for the taking of defendants' property (fee ownership of 33,213.13 acres), including severance damage to the remainder of defendants' ownership to be $514,801.56.

/s/ LEO HAKE,
Foreman

Fee taking and severance damage:

Plaintiff's witnesses: V. J. Conner, $425,000.00; C. Marc Miller, $335,000.00.

Defendants' witnesses: Stanford L. Haney, $1,461,340.00; Howard Thomas, $1,450,154.00; J. D. Urquhart, $1,410,477.47.

[Endorsed]: Filed November 4, 1955.

In the United States District Court for the Eastern District of Washington, Southern Division

Civil No. 452

UNITED STATES OF AMERICA,
Petitioner,

vs.

R. R. HAGGERTY and WINNIE HAGGERTY, his wife; et al., Defendants.

JUDGMENT ON VERDICT AS TO TRACTS C-240 and C-241

The above entitled cause with which was consolidated for trial Civil Cause No. 892, No. 488 and No. 762, came on regularly for trial October 24, 1955, the petitioner appeared by its attorneys of record, William B. Bantz, United States Attorney, and Ronald R. Hull, Assistant United States Attorney, acting under and by direction of the Attorney General, and the defendants, R. R. Haggerty and Winnie Haggerty, husband and wife; R. H. Phillips and Jessie E. Phillips, husband and wife; and D. Everett Phillips and Evelyn Phillips, husband and wife, individually and doing business as a partnership as Phillips, Haggerty Livestock Company, appeared by their attorney, Walter V. Swanson. The defendant, Yakima County, Washington, a municipal corporation, appeared by the filing of its tax and assessment lien statement with reference to said Tracts C-240 and C-241 (in Civil proceeding No. 892). The defendant, Northern Pacific

Railway Company, a corporation, appeared through its attorneys of record, and, the interest of said defendant Northern Pacific Railway Company was removed from trial herein and postponed for later determination, by order of the court dated October 24, 1955.

The issues arising on the petition for condemnation herein having been tried before the court and jury, the said jury returned its verdict herein on November 4, 1955 as follows:

[Title of District Court and Cause No. 452.]

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (4,086.69 acres) to be $5,062.00.

Leo Hake, Foreman

which said just compensation for the term January 1, 1950 to February 14, 1954, inclusive, as to Tracts C-240 and C-241 is computed at a total of Twenty Thousand Eight Hundred Sixty Six and 67/100 Dollars ($20,866.67); and

It appearing to the court that immediately prior to the commencement of said action, on February 10, 1950, the fee simple title to said Tracts C-240 and C-241 was vested in the defendants, R. R. Haggerty and Winnie Haggerty, his wife; R. H. Phillips and Jessie E. Phillips, his wife; D. Everett Phillips and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty

Livestock Company, free and clear of all liens, encumbrances, taxes, assessments, claims, rights or charges of whatsoever nature with exception of the undetermined interest of the defendant Northern Pacific Railway Company; Now, Therefore,

The court having jurisdiction of each of the parties and of the subject matter herein and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the sum found by the jury as above set forth, to-wit, Five Thousand Sixty Two and no/100 Dollars ($5,062.00), represents the fair annual rental value of the interest acquired by the United States commencing January 1, 1950 as to said Tracts C-240 and C-241, inclusive, together with the fair annual severance damage resulting therefrom; that the full true and reasonable amount of all compensation to be allowed to all persons whomsoever, except as above stated, for all damages of whatsoever nature sustained by reason of the taking thereof for the term from January 1, 1950 to February 14, 1954, inclusive, is computed to be the sum of Twenty Thousand Eight Hundred Sixty Six and 67/100 Dollars ($20,866.67), and that payment thereof as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of such taking, except as above stated.

It Is Further Ordered, Adjudged and Decreed that the total sum of Seven Thousand Five Hundred Eighty Two and 50/100 Dollars ($7,582.50) heretofore deposited with the clerk of court in this

cause on the following dates and in the following amounts:

February 10, 1950	$ 842.50
October 16, 1950	1685.00
December 3, 1951	1685.00
May 22, 1953	1685.00
September 15, 1953	1685.00

be and it is hereby applied upon the aforesaid amount leaving a balance payable in the amount of Thirteen Thousand Two Hundred Eighty Four and 17/100 Dollars ($13,284.17); that the following are the only persons having any interest in the compensation to be paid for the taking of said estate in said lands and the clerk of the court is hereby directed to disburse the amount of money now on deposit with respect thereto as follows:

To: R. R. Haggerty and Winnie Haggerty, his wife; R. H. Phillips and Jessie E. Phillips, his wife; D. Everett Phillips and Evelyn Phillips, his wife, c/o Walter V. Swanson, Attorney at Law, Larson Building, Yakima, Washington, $7,582.50.

It Is Further Ordered, Adjudged and Decreed that a deficiency judgment be and the same is hereby entered against the United States of America and in favor of said defendants, R. R. Haggerty and Winnie Haggerty, his wife; R. H. Phillips and Jessie E. Phillips, his wife; D. Everett Phillips and Evelyn Phillips, his wife, in the principal sum of Thirteen Thousand Two Hundred Eighty Four and 17/100 Dollars ($13,284.17), together with interest thereon computed as follows:

(1) At 6% per annum on $5,062.00 from January 1, 1950 until paid;

(2) At 6% per annum on $5,062.00 from January 1, 1951 until paid;

(3) At 6% per annum on $5,062.00 from January 1, 1952 until paid;

(4) At 6% per annum on $5,062.00 from January 1, 1953 until paid;

(5) At 6% per annum on $618.67 from January 1, 1954 until paid,

Less the following credits for interest deductible by reason of deposits into Court:

(1) At 6% per annum on $842.50 from February 10, 1950 until date of payment of judgment;

(2) At 6% per annum on $1685.00 from October 16, 1950 until date of payment of judgment;

(3) At 6% per annum on $1685.00 from December 3, 1951 until date of payment of judgment;

(4) At 6% per annum on $1685.00 from May 22, 1953 until date of payment of judgment.

(5) At 6% per annum on $1685.00 from September 15, 1953 until date of payment of judgment; that upon receipt of funds for the payment of such deficiency the clerk shall without further order of the court pay said sum to said defendants in care of their aforesaid attorney in full satisfaction of said deficiency judgment.

It Is Further Ordered, Adjudged and Decreed that none of the remaining defendants named or described in this cause of action has or had at the

time of the taking of said interest in said property any right, title, estate, lien or interest in or to said property or any right to share in the compensation payable for the taking thereof.

It Is Further Ordered, Adjudged and Decreed that on February 10, 1950 on which date the declaration of taking herein was filed there vested in the United States of America free and clear of any and all charges, interest, claims, taxes, liens and encumbrances of any kind or character whatsoever the following described interest in and to the following described lands:

A term for years commencing January 1, 1950 and ending June 30, 1950, extendible for yearly periods thereafter until June 30, 1955, at the election of the United States, notice of which election shall be filed in this proceeding at any time prior to the end of the term hereby taken or subsequent extensions thereof, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof any and all improvements and structures placed thereon by or for the United States, in and to the following described property, to-wit:

Tract C-240

The West Half of Section 3, all of Sections 4, 5 and 9; the West Half of Section 10; all in Township 13 North, Range 22 East of the Willamette

Meridian, Yakima County, Washington, containing 2566.69 acres, more or less.

Tract C-241

All of Section 17; the North Half and the North Half of the Southwest Quarter of Section 20; the North Half and the North Half of the South Half of Section 21; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington, containing 1520 acres, more or less.

It Is Further Ordered, Adjudged and Decreed that the public use required the condemnation of the property hereinabove described.

Dated this 30th day of November, 1955.

/s/ SAM M. DRIVER,
Judge of U. S. District Court

Presented by:

/s/ RONALD R. HULL,
Assistant United States Attorney

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Judgment Filed November 30, 1955.

In the United States District Court for the Eastern District of Washington, Southern Division

Civil No. 488

UNITED STATES OF AMERICA,

Petitioner,

vs.

RAGNAR L. ARNESEN and JOHN DOE ARNESEN, her husband, et al.,

Defendants.

JUDGMENT ON VERDICT AS TO TRACTS C-241A and C-259

The above entitled cause consolidated for trial with Civil Cause No. 892, No. 452 and No. 762 came on regularly for trial October 24, 1955, the petitioner appearing by its attorneys of record, William B. Bantz, United States Attorney, and Ronald R. Hull, Assistant United States Attorney, acting under and by direction of the Attorney General. The defendants, R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and R. R. Haggerty and Winnie Haggerty, his wife, appeared by their attorney, Walter V. Swanson. The defendant Yakima County, Washington, a municipal corporation, appeared by the filing of its tax and assessment lien statement with reference to said Tracts C-241A and C-259 (in Civil proceeding No. 892).

The issues arising on the petition for condemnation herein having been tried before the court and jury, the said jury returned its verdict herein on November 4, 1955 as follows:

[Title of District Court and Cause No. 488.]

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (3,034.84 acres) to be $2,954.00.

Leo Hake, Foreman

which said just compensation for the term July 1, 1950 to February 14, 1954, inclusive, as to Tracts C-241A and C-259 is computed at a total of Ten Thousand Seven Hundred and 13/100 Dollars ($10,700.13); and

It appearing to the court that immediately prior to the commencement of this action on July 5, 1950 as to Tracts C-241A and C-259 described herein the fee simple title to all of said lands so described was vested in the defendants, R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and R. R. Haggerty and Winnie Haggerty, his wife; and R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, free and clear of all liens, encumbrances, taxes, assessments, claims, rights or charges of whatsoever nature.

Now, Therefore, the court having jurisdiction of each of the parties and of the subject matter herein

and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the sum found by the jury as above set forth, to-wit, Two Thousand Nine Hundred Fifty Four and no/100 Dollars ($2,954.00), represents the fair annual rental value of the interest acquired by the United States commencing July 1, 1950 as to said Tracts C-241A and C-259, inclusive, together with the fair annual severance damage resulting therefrom; that the full true and reasonable amount of all compensation to be allowed to all persons whomsoever for all damages of whatsoever nature sustained by reason of the taking thereof for the term from July 1, 1950 to February 14, 1954, inclusive, is computed to be the sum of Ten Thousand Seven Hundred and 13/100 Dollars ($10,700.13) and that payment thereof as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of such taking.

It Is Further Ordered, Adjudged and Decreed that the total sum of Three Thousand Six Hundred Forty and no/100 Dollars ($3,640.00) heretofore deposited with the clerk of court in this cause on the following dates and in the following amounts:

July 17, 1950	$910.00
February 16, 1952	910.00
May 28, 1953	910.00
September 15, 1953	910.00

be and it is hereby applied upon the aforesaid amount leaving a balance payable in the sum of Seven Thousand Sixty and 13/100 Dollars ($7,-

060.13); that the following are the only persons having any interest in the compensation to be paid for the taking of said estate in said lands and the clerk of the court is hereby directed to disburse the amount of money now on deposit with respect thereto as follows:

To: R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, c/o Walter V. Swanson, Attorney at Law, Larson Building, Yakima, Washington, $3,640.00.

It Is Further Ordered, Adjudged and Decreed that a deficiency judgment be and the same is hereby entered against the United States of America and in favor of said defendants, R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, in the principal sum of Seven Thousand Sixty and 13/100 Dollars ($7,060.13) together with interest thereon computed as follows:

(1) At 6% per annum on $2,954.00 from July 1, 1950 until paid;

(2) At 6% per annum on $2,954.00 from July 1, 1951 until paid;

(3) At 6% per annum on $2,954.00 from July 1, 1952 until paid;

(4) At 6% per annum on $1,838.13 from July 1, 1953 until paid,

Less the following credits for interest deductible by reason of deposits into Court:

(1) At 6% per annum on $910.00 from July 17, 1950 until date of payment of judgment;

(2) At 6% per annum on $910.00 from February 16, 1952 until date of payment of judgment;

(3) At 6% per annum on $910.00 from May 28, 1953 until date of payment of judgment;

(4) At 6% per annum on $910.00 from September 15, 1953 until date of payment of judgment;
that upon receipt of funds for the payment of such deficiency the clerk shall without further order of the court pay said sum to said defendants in care of their aforesaid attorney in full satisfaction of said deficiency judgment.

It Is Further Ordered, Adjudged and Decreed that none of the remaining defendants named or described in this cause of action has or had at the time of the taking of said interest in said property any right, title, estate, lien or interest in or to said property or any right to share in the compensation payable for the taking thereof.

It Is Further Ordered, Adjudged and Decreed that on July 17, 1950 on which date the declaration of taking herein was filed there vested in the United States of America free and clear of any and all charges, interest, claims, taxes, liens and encumbrances of any kind or character of whatsoever the following described interest in and to the following described lands:

A term for years commencing July 1, 1950 and ending June 30, 1951, extendible for yearly periods

thereafter until June 30, 1955, at the election of the United States, notice of which election shall be filed in this proceeding at any time prior to the end of the term hereby taken or subsequent extensions thereof, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof any and all improvements and structures placed thereon by or for the United States in and to the following described property, to-wit:

Tract C-241A

The North Half and the North Half of the South Half of Section 19; all of Section 18; the East Half and the East Half of the West Half of Section 7; all except Lot 4 of Section 6; all in Township 13 North, Range 22 East of the Willamette Meridian; and the East Half and the East Half of the West Half of Section 31, Township 14 North, Range 22 East of the Willamette Meridian; all in Yakima County, Washington, containing 2,714.84 acres, more or less.

Tract C-259

The West Half of Section 12, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington, containing 320 acres, more or less.

It Is Further Ordered, Adjudged and Decreed

that the public use required the condemnation of the property hereinabove described.

Dated this 30th day of November, 1955.

/s/ SAM M. DRIVER,
Judge of the U. S. District Court

Presented by:

/s/ RONALD R. HALL,
Assistant United States Attorney

Acknowledgment of Service attached.

[Endorsed]: Judgment Filed November 30, 1955.

In the United States District Court for the Eastern District of Washington, Southern Division

Civil No. 762

UNITED STATES OF AMERICA,
Plaintiff,

vs.

6,868.22 ACRES OF LAND, more or less, in Yakima County, Washington; et al.,
Defendants.

JUDGMENT ON VERDICT AS TO TRACTS C-205, C-209 and C-219

The above entitled cause with which was consolidated for trial Civil Cause No. 892, No. 488 and No. 452 came on regularly for trial October 24, 1955, the plaintiff appeared by its attorneys of record, William B. Bantz, United States Attorney, and Ronald R. Hull, Assistant United States At-

torney, acting under and by direction of the Attorney General, and the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, appeared by their attorney, Walter V. Swanson. The defendant Yakima County,Washington, a municipal corporation appeared by the filing of its tax and assessment lien statement with reference to said Tracts C-205, C-209 and C-219 (in Civil proceeding No. 892).

The issues arising on the complaint for condemnation herein having been tried before the court and jury, the said jury returned its verdict herein on November 4, 1955 as follows:

[Title of District Court and Cause No. 762.]

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (6,868.22 acres) to be $7,240.00.

Leo Hake, Foreman

which said just compensation for the term October 28, 1952 to February 14, 1954, inclusive, as to Tracts C-205, C-209 and C-219, is computed at a total of Nine Thousand Three Hundred Seventy-One and 75/100 Dollars ($9371.75); and

It appearing to the court that immediately prior to the commencement of said action on December 17, 1952 and thereafter to and including February 15, 1954 the fee simple title to said Tracts C-205,

C-209 and C-219 was vested in the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, free and clear of all liens, encumbrances, taxes, assessments, claims, rights or charges of whatsoever nature;

Now, Therefore, the court having jurisdiction over each of the parties and of the subject matter herein and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the sum found by the jury as above set forth, to-wit, Seven Thousand Two Hundred Forty and no/100 Dollars ($7,240.00), represents the fair annual rental value of the interest acquired by the United States commencing October 28, 1952 as to said Tracts C-205, C-209 and C-219, inclusive, together with the fair annual severance damage resulting therefrom; that the full true and reasonable amount of all compensation to be allowed to all persons whomsoever for all damages of whatsoever nature sustained by reason of the taking thereof for the term from October 28, 1952 through February 14, 1954, inclusive, is computed to be the sum of Nine Thousand Three Hundred Seventy One and 75/100 Dollars ($9,371.75), and that the payment thereof as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of such taking.

It Is Further Ordered, Adjudged and Decreed that the following are the only persons having any interest in the compensation to be paid for the taking of said estate in said lands and that said defendants are entitled to receive the whole of said compensation:

R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife.

It Is Further Ordered, Adjudged and Decreed that a judgment be and the same is hereby entered against the United States America and in favor of said defendants, R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and R. R. Haggerty and Winnie Haggerty, his wife, in the principal sum of Nine Thousand Three Hundred Seventy One and 75/100 Dollars ($9,371.75), together with interest thereon computed as follows:

(1) At 6% per annum on $7,240.00 from October 28, 1952 until paid;

(2) At 6% per annum on $2,131.75 from October 28, 1953 until paid;

that upon receipt of funds for the payment of such judgment the clerk shall without further order of the court pay said sum to said defendants in care of their attorney, Walter V. Swanson, Larson Building, Yakima, Washington, in full satisfaction of said judgment.

It Is Further Ordered, Adjudged and Decreed that none of the remaining defendants named or

described in this cause of action has or had at the time of the taking of said interest in said property any right, title, estate, lien or interest in or to said property or any right to share in the compensation payable for the taking thereof.

It Is Further Ordered, Adjudged and Decreed that as of December 17, 1952, on which date the complaint in condemnation herein was filed, there vested in the United States of America free and clear of any and all charges, interest, claims, taxes, liens and encumbrances of any kind or character whatsoever the following described interest in and to the following described lands:

A term for years commencing October 28, 1952 and ending on June 30, 1953, extendible for yearly periods thereafter at the election of the United States until June 30, 1957, notice of which election shall be filed in the proceeding at least thirty days prior to the end of the term taken or subsequent extensions thereof together with the right to remove within a reasonable time after the expiration of the term taken or any extensions thereof any and all improvements and structures placed thereon by or for the United States, subject, however, to existing easements for public roads, and highways, public utilities, railroads and pipe lines in and to the following described property, to-wit:

Tract C-205

All of Section 5, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington, containing 628.22 acres, more or less.

Tract C-209

All of Section 9, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington, containing 640.0 acres, more or less.

Tract C-219

All of Sections 15, 17, 21, 27, 28, 29 and 33 in Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Section 20, Except the north half of the northeast quarter thereof; and all of Section 22, Except the north half of the northwest quarter thereof; all in said township and range, Yakima County, Washington, containing 5600.0 acres, more or less.

It Is Further Ordered, Adjudged and Decreed that the public use required the condemnation of the property hereinabove described.

Dated this 30th day of November, 1955.

/s/ SAM M. DRIVER,
Judge of the U. S. District Court

Presented by:

/s/ RONALD R. HULL,
Assistant United States Attorney

Acknowledgment of Service attached.

[Endorsed]: Judgment Filed November 30, 1955.

In the United States District Court for the Eastern District of Washington, Southern Division

Civil No. 892

UNITED STATES OF AMERICA,

Plaintiff,

vs.

33,213.13 ACRES OF LAND, more or less, situate in the County of Yakima, State of Washington, and R. H. PHILLIPS and JESSIE E. PHILLIPS, his wife; et al.,

Defendants.

JUDGMENT ON VERDICT

The above entitled cause with which was consolidated for trial Civil No. 488, No. 452 and No. 762 came on regularly for trial October 24, 1955, the plaintiff appearing by its attorneys of record, William B. Bantz, United States Attorney, Ronald R. Hull, Assistant United States Attorney, acting under and by direction of the Attorney General; and the defendants, R. H. Phillips and Jessie E. Phillips, his wife; R. R. Haggerty and Winnie Haggerty, his wife; D. Everett Phillips and Evelyn Phillips; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, and as Cold Creek Company, a partnership, appeared by their attorney, Walter V. Swanson. The defendant Northern Pacific Railway Company, a corporation, appeared through its attorneys of record and the

interest of said defendant Northern Pacific Railway Company was removed from trial herein and postponed for later determination by order of the court dated October 24, 1955. The defendant Shell Oil Company, a corporation, appeared through its attorneys of record by the filing of notice of such appearance, said defendant Shell Oil Company, a corporation, taking no part upon trial of said cause although having been duly and regularly served with process herein. Said defendants Laurent Regimbal and Jane Doe Regimbal, whose true name is Viola Regimbal, entered no formal appearance herein, either of record or upon trial of said cause although said defendants were duly and regularly served with process herein. The defendant Yakima County, Washington, a municipal corporation, appeared by the filing of its tax and assessment lien statement herein filed on March 2, 1954. The defendants Walter V. Swanson and Marjorie T. Swanson, husband and wife, entered no formal appearance herein, either of record or upon trial of said cause although said defendants were duly and regularly served with process herein.

The issues arising on the complaint for condemnation herein having been tried before the court and jury, the said jury returned its verdict herein on November 4, 1955 as follows:

[Title of District Court and Cause No. 892.]

We, the jury in the above entitled cause, find just compensation for the taking of defendants' property (fee ownership of 33,213.13 acres), in-

cluding severance damage to the remainder of defendants' ownership to be $514,801.56.

Leo Hake, Foreman

It appeared to the court that immediately prior to the taking on February 15, 1954 of the lands hereinafter described, the fee simple title thereto was vested in the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, free and clear of all liens, encumbrances, taxes, assessments, claims, rights or charges of whatsoever nature, except taxes and assessments due and owing to Yakima County, Washington, a municipal corporation, constituting a lien on said property as of said date of taking herein, in the sum of One Thousand Two Hundred Eighteen and 80/100 Dollars ($1,218.80) and except the mineral rights, if any, of the defendant Northern Pacific Railway Company, a corporation, as aforesaid.

Now, Therefore, the court having jurisdiction of each of the parties and of the subject matter of the action and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the sum found by the jury as above set forth represents the fair market value of said property exclusive of the mineral interests of the Northern Pacific Railway

Company, and the full true and reasonable amount of all compensation to be allowed to all persons whomsoever, except as to said Northern Pacific Railway Company, for all damages of whatsoever nature sustained by reason of the taking thereof and that payment as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of such taking.

It Is Further Ordered, Adjudged and Decreed that the sum of Three Hundred Seventy One Thousand Seven Hundred and no/100 Dollars ($371,700.00) paid as advance compensation pursuant to the order of court entered herein on February 16, 1954 be and it is hereby applied upon the aforesaid amount leaving a balance payable in the sum of One Hundred Forty Three Thousand One Hundred One and 56/100 Dollars ($143,101.56); that the following are the only persons having any interest in the compensation to be paid for the taking of said lands and the clerk of the court is hereby directed to disburse the balance of the moneys now on deposit with the clerk of court in this cause with respect thereto as follows, to-wit:

To: R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife, c/o Walter V. Swanson, Attorney at Law, Larson Building, Yakima, Washington, $40,081.20.

To: Yakima County, Washington, a municipal corporation, c/o County Treasurer, County Court House, Yakima, Washington, $1,218.80.

It Is Further Ordered, Adjudged and Decreed that a deficiency judgment be and the same is hereby entered against the United States of America and in favor of the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife, in the principal sum of One Hundred One Thousand Eight Hundred One and 56/100 Dollars ($101,801.56), together with interest thereon at the rate of six per cent per annum from February 15, 1954 until paid and that upon receipt of funds for the payment of such deficiency the clerk shall without further order of the court pay said sum to said defendants in care of their aforesaid attorney in full satisfaction of such deficiency judgment.

It Is Further Ordered, Adjudged and Decreed that except as to the interest of Yakima County, Washington, as aforesaid and except as to the mineral interest, if any, of the defendant Northern Pacific Railway Company, a corporation, none of the remaining defendants named or described in this proceeding has or had at the time of the taking of said property any right, title, estate, lien or interest in or to said property or any right to share in the compensation payable for the taking thereof.

It Is Further Ordered, Adjudged and Decreed that on February 15, 1954, there vested in the United States of America free and clear of any and all charges, interest, claims, rights, taxes, liens and encumbrances of any kind or character whatsoever the fee simple title in and to the following

described lands situate in the County of Yakima, State of Washington, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and pipe lines, to-wit:

EXHIBIT "A"

[Printer's Note: Attached Exhibit "A" is a duplicate of Exhibit "A" set out in full at pages 31-36 of this printed record.]

It Is Further Ordered, Adjudged and Decreed that the public use required the condemnation of the property hereinabove described.

Dated this 30th day of November, 1955.

/s/ SAM M. DRIVER,
Judge of the U. S. District Court

Presented by:

/s/ RONALD R. HULL,
Assistant United States Attorney.

Acknowledgment of Service attached.

[Endorsed]: Judgment Filed November 30, 1955.

[Title of District Court and Causes 892, 452, 488 and 762.]

MOTION FOR NEW TRIAL

Come now the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and Walter V. Swanson and Marjorie T. Swanson, his wife, and respect-

fully move the above entitled Court for a new trial for the following reasons:

1. Irregularity in the proceedings of the Court, jury or adverse party, or any order of the Court or abuse of discretion by which the losing party was prevented from having a fair trial.

2. Misconduct of the attorney for the prevailing party.

3. Error in law occurring at the trial.

4. Newly discovered evidence.

5. Substantial justice was not done.

In particular the errors in law occurring at the trial relied upon are:

1. Argument of counsel for the condemnor that the jury had the right to consider the profit in condemnees' purchase as a yardstick of value, and the ruling of the Court in the affirmative over objection.

2. For sustaining objections to testimony of value of gross product of the land in dollar sales.

3. In excluding exhibits numbered 120, 96 and 97, and in excluding said exhibits from consideration by the jury in each of the four consolidated cases separately.

4. In excluding testimony offered by way of proof:

(a) That the area was a probable area for exploration by a competent witness and by the same witness that a number of companies actually leased the surrounding areas for varying values.

(b) That under such circumstances landowners' mineral rights have a market value.

(c) That landowners' mineral rights have a rental value as a portion of the highest and best use of the land.

5. In invading the province of the jury by making findings of fact with regard to offered proof of increase in value to the fee by reason of the existence of mineral rights in a probable area, and by making a finding of fact contrary to the contention of the defendants that the leasehold use of the land had an increased value for exploration rights.

6. In affirmatively ruling prior to instruction that no instructions would be considered or given with relation to mineral rights or exploration therefor, notwithstanding the fact that actual testimony of $2.00 per acre is contained in the record.

Newly discovered evidence of transfer and dealing in mineral rights.

/s/ WALTER V. SWANSON,
Attorney for said Defendants

Acknowledgment of Service attached.

State of Washington,
County of Yakima—ss.

R. W. Slemaker, Jr., being first duly sworn, on oath deposes and says:

That I am in the business of purchasing mineral rights. I am associated with my father in the company, and we are the owners of mineral rights in approximately 29 states. We acquire all or a portion of the landowners' mineral rights in areas

which have not been explored by drilling, past or present, and particularly desire to obtain mineral rights in areas in which major oil companies are commencing leasing operations. Our company is wholly unconcerned as a matter of business practice whether an area is explored or not or whether the value of minerals in the ground has been proven or not for the reason that rental for exploration right is a major source of the income of our company; for example, in Yakima County leasing of mineral rights to major companies is now returning to the landowners' mineral right varying income from 25c per acre per year to $1.00 per acre per year. In event of exploration showing no value to mineral right, then such leasing of course ceases, at least until major oil company interest is aroused again in the area. Leasing of mineral rights continues for as long as twenty years in some areas by successive companies prior to development or failure to develop actual oil or gas resources. Of course in those particular areas where actual discovery happens, mineral rights become extremely valuable in the area involved.

My company is attempting to purchase an interest in mineral rights up to 15,000 acres in Yakima County as a first block. Mineral rights are very difficult to purchase and I have not completed my commitment in three weeks of effort here in Yakima. I have arranged for the purchase of a portion of the mineral rights of Shirley Ward in Townships 12, 14 and 15, Range 17, in Yakima County, at $1.00 per acre for a half interest. I am

negotiating and willing to purchase other acreage to the amount stated at the same rate.

/s/ R. W. SLEMAKER, JR.

Subscribed and Sworn to before me this 1st day of December, 1955.

[Seal] /s/ DOUGLAS A. WILSON,
Notary Public in and for the State of Washington, residing at Yakima.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Causes 892, 452, 488 and 762.]

ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL

The above entitled causes, being Civil No. 892, 452, 488 and 762 consolidated for trial, having come on before the Court upon Motion for New Trial interposed by the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and Walter V. Swanson and Marjorie T. Swanson, his wife, and the court having heard and considered argument of counsel and being fully advised in the premises,

It Is Hereby Ordered that the Motion for New Trial of said defendants, be and the same is hereby denied.

Dated and Done in Open Court this 6th day of January, 1956.

/s/ SAM M. DRIVER,
Judge of the U. S. District Court

Presented by:

/s/ WILLIAM B. BANTZ,
United States Attorney
/s/ RONALD R. HULL,
Assistant United States Attorney
Attorneys for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 6, 1956.

[Title of District Court and Cause No. 452.]

NOTICE OF APPEAL

Notice Is Hereby given that R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everett Phillips and Evelyn Phillips, his wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of November, 1955, and from the order denying new trial entered on the 6th day of January, 1956.

/s/ WALTER V. SWANSON,
Attorney for all said Appellants

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause No. 488.]

NOTICE OF APPEAL

Notice Is Hereby Given that R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everrett Phillips, also known as D. Everett Phillips, and Evelyn Phillips, his wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of November, 1955, and from the order denying new trial entered on the 6th day of January, 1956.

/s/ WALTER V. SWANSON,
Attorney for all said Appellants

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause No. 762.]

NOTICE OF APPEAL

Notice Is Hereby Given that R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everett Phillips and Evelyn Phillips, his wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of

November, 1955, and from the order denying new trial entered on the 6th day of January, 1956.

/s/ WALTER V. SWANSON,
Attorney for all said Appellants

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause No. 892.]

NOTICE OF APPEAL

Notice Is Hereby Given that R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everett Phillips and Evelyn Phillips, his wife, individually and in behalf of the Cold Creek Company, a partnership composed of the foregoing defendants, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of November, 1955, and from the order denying new trial entered on the 6th day of January, 1956.

/s/ WALTER V. SWANSON,
Attorney for all said Appellants

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Causes 892, 488, 452 and 762.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington do hereby certify that the documents annexed hereto are the originals filed in the above consolidated causes called for in Appellant's Designation filed on March 14, 1956, and in Appellee's Designation filed on March 23, 1956,

Complaint in Cause No. 892.

Letter from Attorney General authorizing filing of case, No. 892.

Declaration of Taking, Cause No. 892.

Motion for Order for Delivery of Possession, No. 892.

Order for Possession, No. 892.

Affidavit of Mailing Order for Possession.

Petition for payment of advance compensation, No. 892.

Government Exhibits No. A through Y, inclusive, Title Certificates, No. 892.

Order for advance compensation, No. 892.

Notice of Lis Pendens, No. 892.

Tax and Assessment Lien Statement, No. 892.

Notice and Marshals returns on notice, No. 892.

Appearance of Dean H. Eastman for N. P. Ry. Co.

Stipulation extending time to plead or take other action, No. 892.

Appearance of Patton, Coye and Radford for Shell Oil Company, No. 892.

Petition for Dismissal of Mineral Rights from Condemnation Proceedings, No. 892.

Order denying petition for dismissal of Mineral Rights, No. 892.

Motion for Summary Judgment as to defendant, Northern Pacific Railway Co., No. 892.

Stipulation continuing hearings on motion for Summary Judgment and issue of compensation of Northern Pacific Railway Co., No. 892.

Order approving stipulation.

Motion and affidavit for continuance of trial.

Disclaimer of Laurent Regimbal, et ux.

Order consolidating causes for trial: Nos. 892, 452, 488 and 762.

Order on stipulation, excluding determination of mineral rights of N. P. Ry. Co. from trial.

Plaintiff's Proposed Instructions to Jury.

Copy of computation of experts' value testimony submitted to the jury on stipulation of parties.

Verdict of Jury, No. 892.

Petition for Condemnation, No. 488.

Motion and affidavit for Order granting right of possession, No. 488.

Order for Possession, No. 488.

Letter from Attorney General authorizing filing of case, No. 488.

Declaration of Taking, No. 488.

Order on Declaration of Taking, No. 488.

Affidavit of Mailing Order on D. of T., No. 488.

Affidavit of Mailing Order for Possession, No. 488.

Lis Pendens, No. 488.

Notice of Election to Extend Term to June 30, 1952 Tracts C-241-A, C-243, C-246, C-258, C-259, C-264, C-275, C-279, C-280 and C-281.

Notice of Election to Extend Term to June 30, 1953 same tracts.

Notice of Election to Extend Term to June 30, 1954 Tracts C-241-A and C-259.

Affidavit of Mailing Notice of Election Tracts C-241-A and C-259.

Copy of computation of experts' value testimony submitted to the jury on stipulation of parties, Tracts C-241-A and C-259, No. 488.

Verdict of Jury, Tracts C-241-A and C-259, No. 488.

Petition for Condemnation, No. 452.

Letter from Attorney General authorizing filing of case, No. 452.

Declaration of Taking, No. 452.

Order on Declaration of Taking, No. 452.

Affidavit of mailing Order on D. of T.

Lis Pendens, No. 452.

Notice of Election to Extend Term to June 30, 1951.

Notice of Election to Extend Term to June 30, 1952.

Notice of Election to Extend Term to June 30, 1953.

Notice of Election to Extend Term to June 30, 1954 Tracts C-240 and C-241, No. 452.

Affidavit of mailing Notice of Election Tracts C-240 and C-241, No. 452.

Copy of computation of experts' testimony submitted to jury on stipulation of parties Tracts C-240 and C-241, No. 452.

Verdict of Jury, Tracts C-240 and C-241, No. 452.

Complaint in Cause No. 762.

Letter from Attorney General authorizing filing of case, with attached Exhibits No. A, B, C and D, No. 762.

Lis Pendens, No. 762.

Notice and Marshal's returns of service.

Notice of Election to Extend Term to June 30, 1954.

Affidavit of Mailing Notice of Election.

Application for setting case for trial, No. 762.

Copy of computation of experts' testimony submitted to the jury on stipulation of parties, No. 762 Tracts C-209 and C-205 and C-219.

Verdict of Jury, Tracts C-209, C-205 and C-219.

Reporter's Record of Proceedings at the trial of consolidated cases No. 892, 488, 452 and 762.

Judgment on Verdict, No. 892.

Judgment on Verdict, No. 488, Tracts No. C-241A and C-259.

Judgment on Verdict, No. 452, Tracts No. C-240 and C-241.

Judgment on Verdict, No. 762, Tracts No. C-205, C-209 and C-219.

Motion to Amend Judgment on Verdict, No. 762.

Order Amending Judgment on Verdict, No. 762.

Motion for New Trial, Consolidated Nos. 892, 488, 452 and 762.

Order denying motion for new trial.

Affidavit of mailing Order denying motion for new trial.

Petition for Payment of Advance Compensation No. 892.

Order directing payment of Advance Compensation No. 892.

Petition for payment of Advance Compensation No. 488.

Order directing payment of Advance Compensation No. 488.

Petition for payment of Advance Compensation No. 452.

Order directing payment of Advance Compensation No. 452.

Petition for payment of Advance Compensation Consolidated Nos. 892, 452, 488 and 762.

Order directing payment of Advance Compensation Consolidated Nos. 892, 452, 488 and 762.

Notice of Appeal, No. 892.

Notice of Appeal, No. 488.

Notice of Appeal, No. 452.

Notice of Appeal, No. 762.

Designation of Record on Appeal, Consolidated Nos. 892, 452, 488 and 762.

Statement of Points on Appeal, Consolidated Nos. 892, 452, 488 and 762.

Appellee's Designation of Record on Appeal Consolidated Nos. 892, 452, 488 and 762.

Order Extending Time to file and docket Record on Appeal to and including May 31, 1956.

Motion for Bond for Costs on Appeal.

Order for Bond for Costs on Appeal.

Bond for Costs on Appeal.

Stipulation to eliminate certain exhibits from Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District this 28th day of May, 1956.

[Seal] STANLEY D. TAYLOR,
Clerk

/s/ By THOMAS GRANGER,
Deputy

In the District Court of the United States for the Eastern District of Washington, Southern Division

Consolidated Cases Civil Nos. 892, 488, 452, and 762

United States of America, Plaintiff,

vs.

33,213.13 Acres of Land, more or less, situate in the County of Yakima, State of Washington, and R. H. Phillips and Jessie E. Phillips, his wife, et al, and Ragnar L. Arneson, R. H. Phillips and Jessie E. Phillips, his wife, et al, and R. R. Haggerty, et al, and 6,868.22 Acres of Land, more or less, situate in the County of Yakima, State of Washington, R. H. Phillips, et al, Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Yakima, Washington, October 24, 1955, 10 a.m. [*]

* * * * *

Mr. Hull: I do have two maps which we might get identified.

Mr. Swanson: These maps counsel wishes to use in his opening statement and I have no objection, your Honor.

The Court: Having had time to think it over overnight, I am still quite disturbed, and I think counsel is a little worried, too, about this mineral rights situation.

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* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

I don't want to deprive an owner of making a showing of anything in which he is entitled to compensation on a finding of the jury, but at the same time I think it would be tragic to seriously jeopardize a big verdict here by the Court's submitting something that shouldn't properly go to the jury. Of course, if it is a large and favorable verdict for the land owner, it is within the realm of—I will not say possibility, but perhaps probability that the government would appeal, because there is a great deal involved here and an appeal to the Court of Appeals at best means about a two year delay, a lot of expense for somebody getting the record up there, and if error is found, a new trial beginning all over again about two years from now. [66]

So I have examined the authorities that Mr. Hull submitted to me and I think they bear out his contention that unless the land is a proved field or reasonably adjacent to a proved field, which isn't the situation here, that mineral values, as such, cannot be made the basis of compensation, unless there can be shown reasonable probability that they exist there. And, having been through these cases before, I don't think it is possible to show reasonable probability of gas and oil values under these lands.

Now, I think in a prior case I did submit the rather tenuous proposition that the jury could find how much the market value of the land had been enhanced by the possibility of leasing it for exploration purposes, but, frankly, I am getting a little concerned about that and doubtful about it. I can't

see how as a practical matter you could prove how much the possibility of leasing for exploration would enhance the market value of this land unless you could show how much is paid by oil companies for leases, and then you get back to the proposition of putting in these leases and the amount that the owner would get for exploration leases, which I think is clearly improper because it is too speculative.

Now, I am just voicing my concern here at this early stage so that if Mr. Swanson has any [67] cases here or my authorities that can bear out the proposition or the question of whether there is a value there, a market value or enhancement of market value by reason of the possibility of leasing it for exploration, I would like to have them submitted so that I can have the benefit of them before we reach that point. It probably won't finally be reached until Mr. Swanson's case or perhaps when it comes time to instruct the jury.

Mr. Swanson: As you know, I have done a great deal of research on that and there does not seem to be cases in Federal Court on the point, your Honor, excepting the general law that all matters concerning value should be translated that are capable of being translated into value should come before the jury and should be the subject of an award, and that is the reason why I was directed to and I did move for a separation of the mineral rights from this verdict, for many reasons. If the government wants to appeal, for instance, and it takes two years and they should fail in their appeal and there is a

verdict on the amount which we claim and I believe we will prove the value is in this, they lose 6 per cent per year, which is a large amount of money. It will run more than $100,000 to $200,000 in this amount which we feel that we can surely prove here.

So it is a two-headed sword and that is why I felt it was to the advantage of the government [68] and to the land owner to suspend all mineral rights, not just those of the Northern Pacific, and I have a motion in to that effect. This Court can hardly be expected to take the burden of that type of a tenuous situation, and I believe it is, too, your Honor, and that is the reason I brought it up, and tack it on to a heavy case which burdens both the government and the land owner, when it could be separated, and I feel that failure of the government to agree to accede to that is by reason of failure to realize the facts of the situation.

Mr. Hull: With reference to the comments the Court has made about the submission of evidence which could be entertained as to mineral values in this case, as I mentioned yesterday, I still can't see that we are not bordering dangerously on the question of anticipated future profits. I agree wholeheartedly that nobody wants any error in this case, and if it is possible for us to find any further citations, we will submit them.

The Court: Well, I assume that probably there isn't any directly in point.

Mr. Hull: I could find no others.

The Court: I haven't been able to find it.

So far as the separation of value, of course, the

general rule, as we all concede, is that the valuation of leased real property taken for public use [69] should be as a whole, as a unit, although I think that where different elements of value are present and are not inconsistent, they could be separated on stipulation. I think that is borne out in some of the cases that I just read this morning. Here, I take it, the exploitation of mineral value would not be inconsistent with agricultural value, because you could drill oil wells——

Mr. Swanson: That's right.

The Court: ——and take the oil and gas off and still use it without any substantial reduction in value for stock raising purposes. There are other things that would be inconsistent. You would have both uses.

But so far as the stipulation is concerned, I appreciate Mr. Hull's situation because I worked for the government quite a long time myself and I don't suppose he would have authority to stipulate here without getting authority from Washington, and it is a little late for that with the jury trial already started.

Mr. Swanson: Well, your Honor, there is nothing personal. I know personally Mr. Hull would very much like to do this, and he has tried and it is true that he has no control over it.

The Court: I just simply mentioned that to show the practical situation here.

All right, you can bring in the jury, then. [70]

Mr. Hull: If the Court please, am I correct in believing that the order of consolidation of the four cases has been entered?

The Court: Yes, I have signed that.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: I think the record should show that the jury view of the premises having been completed, all the jurors are back in the court and, so far as I can determine at least, in reasonably good condition.

You may proceed, then. [71]

* * * * *

C. MARC MILLER

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

By Mr. Hull:

Q. Mr. Miller, where do you live and what is your occupation?

A. I live in Seattle, Washington and I am [278] a real estate broker and appraiser.

Q. What is the name of your firm and company?

A. The Pacific Northwest Land Company is my real estate brokerage business. My appraisal business is operated under the name of C. Marc Miller & Associates.

Q. How long have you been in that business, Mr. Miller?

A. Since 1928, and I have been a real estate broker continously since then.

Q. How long in Seattle?

A. I moved to Seattle in 1931, having started in the real estate business in Port Townsend on the

(Testimony of C. Marc Miller.)

Olympic Peninsula. I have maintained an office in Seattle continuously since 1931. However, in 1934 I also had an office in Eastern Washington in Grant County and I maintained an office in Grant County from 1934 until 1938, when I moved my Eastern Washington office to White Bluffs, which was within the Hanford Project but what later became the Hanford Project. I had my office in White Bluffs from 1938 until 1943, which was the inception of the Hanford Project when the government acquired the land there.

Q. Do you also, in addition to the operation of your brokerage business and real estate business, own land yourself?

A. Yes, I have owned land in Grant County and in Chelan [279] County and Benton County in Eastern Washington.

Q. What type of land was it and how much of it?

A. It is business property in Wenatchee and a part of an orchard there. I owned dry land farmland in Benton County. I owned land in Grant County which was wheat land that was recently sold. I now own an irrigated farm in Grant County. My land in Benton County is range land. At one time, I should say, I owned considerable land in the Priest Rapids Irrigation District in the Hanford area.

Q. You say you owned some land in Benton County? A. Yes, sir.

(Testimony of C. Marc Miller.)

Q. Is that anywhere near the Phillips-Haggerty tract?

A. It corners the southeast corner of the Phillips and Haggerty property.

Q. And approximately how many acres is your ownership there?

A. There is about 1,200 acres left in that ownership.

Q. Is that range land? A. Yes.

Q. Then you have been familiar with and operated on land in Eastern Washington over quite a few years? A. Over 20 years.

Q. What familiarity have you with the firing range area in particular? [280]

A. I volunteered for the Corps of Engineers in the spring or in the early winter of '42—I mean really the late winter of '42-'42—and was placed in charge of the Real Estate Division for the Army for this area at that time, and my very first job was to come to Yakima to arrange for the acquisition of the Yakima Artillery Range at that time in 1942.

Q. Were you a full-time employee of the government at that time?

A. Yes, that's right, I was.

Q. For what period of time?

A. From 1942 in about February of that year until April of 1943.

Q. Are you now or have you since that time been an employee of the government as a full-time basis?

A. No, that is my only employment with the government.

(Testimony of C. Marc Miller.)

Q. I see. What experience have you had in the field of appraisement of real estate?

A. Well, I have appraised land, my first appraisal was in 1930. I have in the last 10 years devoted my entire time to the appraisal of real estate. My real estate activity has been a specialty entirely in the field of farm and ranch business. I have limited my appraisal work to that appraising too of farm and ranch land. It has not been limited to the State of Washington, but [281] principally in the State of Washington.

Q. I see. And when you speak of farm and ranch land, what type of farming?

A. Both irrigated and dry land farming.

Q. And ranching, you mean stock raising?

A. Yes, sir.

Q. Cattle? A. Uh-huh.

Q. Have you appeared as an expert witness in condemnation cases before?

A. Yes, I have in both the state courts and the Federal Courts for both the land owner and for the government, and for the State of Washington and for the City of Seattle, for King County, for Jefferson County, and for the City of Port Townsend.

Q. Do you belong to any professional organizations?

A. I belong to the American Society of Farm Managers and Rural Appraisers.

Q. Now, are you familiar with the land, the

(Testimony of C. Marc Miller.)

subject of this case know as the Phillips-Haggerty tract?

A. Yes, sir, I have been. I have known the Rothrock part of the ownership probably longer than the other land in that I was on that Rothrock land as early as 1939 or '40 when we had the property for sale.

Q. Referring to Map No. 5, what portion [282] of the Phillips-Haggerty tract does that represent?

A. The Rothrock ownership is the northern part of the property ranging north of the Umtanum Ridge, the ridge running generally southeasterly-northwesterly through the tract. The Rothrock ownership contains slightly over 15,000 acres of ground in the northern end, including the present land which is marked in purple on here.

Q. You say you had that Rothrock ownership listed for sale at one time yourself?

A. Yes, sir.

Q. What year or years was that?

A. Well, we had it for sale up to the time when it was purchased by Phillips and Haggerty.

Q. Did you handle that transaction?

A. No, sir, had nothing to do with that.

Q. Then when did you first go on to that Rothrock portion?

A. I went on to that property either '30 or '40 and drove up to Priest Rapids, which is in Section 3 along the river, and Brown Brothers and Sisk were operating the Rothrock Ranch at that time and had their headquarters there and their irriga-

(Testimony of C. Marc Miller.)

ted farm land at that point, and from that point either Wynn or Russ Brown, I am not sure which now, but one of the Brown Brothers and I rode by horse up over part of this range and went up to Buffalo Springs and came down Sourdough [283] Canyon.

Q. I see. As to the portion portions of the Phillips-Haggerty ownership, the Coffin and Bailey places, when did you first see them?

A. I first went on the Coffin ownership in I believe it was 1942 or '3 or '4. I am not sure, it is just about the time when the government acquired the lower land and it was the time that Coffin was offering the property for sale.

Q. Did you have anything to do with that?

A. I had nothing to do with the sale. However, it was a general listing and I called upon the Coffins many times regarding the sale of this property and went on the land at that time.

Q. I see. Since the early 40's that you have spoken of, have you been out on the land of the Phillips-Haggerty tract since?

A. I have been on parts of it since.

Q. What portions?

A. I was up at the upper part, oh, through the latter 40's and drove down as far as the ranch headquarters and back. I don't believe I was on any part of the other ranch until this year, although I might have gone into the lower end of it, but I don't remember.

(Testimony of C. Marc Miller.)

Q. This year, did you have occasion to go back onto the Phillips-Haggerty property? [284]

A. Yes.

Q. And to what extent did you cover it?

A. Went back there for the purpose of making an appraisal and I again went over the entire ownership as well as I could. That is, I haven't set foot on every foot of it, but I have been over all of the roads there and up to the water holes, inspected the buildings and improvements on the property.

Q. Will you tell us now just in general terms the aspect of the Phillips-Haggerty Ranch as you saw it?

A. The land is much as it was in the past, there has been very little change, excepting there is more land in cultivation now than when Mr. Coffin owned it. The Coffin part of the ownership is still enclosed in the fencing as it was then. The Bailey fencing is around the Bailey ownership. The Rothrock ownership has a fence along the west end, which I think is a better fence than was there before and probably is a newer fence. The road through the property now, of course, is a much improved road than the one that I had to travel to get into the property before.

Q. You are speaking of the Cold Creek Road?

A. The Cold Creek Road, yes. The land appears to be in good condition, the range is good. I noticed particularly along the north slope of both the [285] Yakima and the Umtanum Ridge considerable grass forage. The western part of the range, being the

(Testimony of C. Marc Miller.)

higher part, is the better part and is a good range.

Q. What as to the balance of the range land to the east?

A. Well, this property in the southeast corner as you go down Cold Creek gets to a lower elevation with less precipitation. It has principally sage brush and cheat grass. That continues all down the Cold Creek draw continually getting worse as it gets down below. The eastern end of the Rothrock range runs down to an elevation of approximately 600 feet in the ownership here and is quite gravelly, open soil, covered mostly by a small amount of grass and some sage brush.

Q. When you first came to know these properties, for what purpose were they being operated, that is, what use were they being put to?

A. Brown Brothers and Sisk ran cattle over the Rothrock part of the ownership.

Q. You speak of some irrigated land, is that anywhere within the Phillips-Haggerty area of taking?

A. No, sir, the headquarters for that operation was off of the ownership down on the river and received water for irrigation from the diversion canal of the Priest Rapids Irrigation District. They wintered all of their stock down there and fed all of their stock down there, [286] and that was a cattle operation.

The Coffin operation had principally been sheep. Forrest Winner had operated it as a sheep ranch

(Testimony of C. Marc Miller.)

and Coffin inherited through the Winner estate and continued to operate as a sheep ranch.

Q. From your observation of the entire ownership of some 36,000 acres now, your experience and from your judgment, what as of the date of taking in this case in the month of February, 1954—I am speaking now of the taking of the fee——

A. Yes, sir.

Q. ——what was the highest and best use of that property?

A. Well, in my judgment, the highest and best use of the tract of ground, the entire ownership, would be as a cattle or sheep range. It has some benefits for sheep and it has others for cattle. The lower ranges have considerable browse that cattle won't use but sheep will, but I would judge as a cattle ranch, it would be good or as a sheep ranch.

Q. Would it be possible to use it as a year around range within certain limits?

A. Oh, yes, it would be possible, but it is lacking in high range and it is questionable to me whether there is enough cultivatable land there to produce enough hay to handle the cattle through the winter. However, I [287] assume that if all the cultivated land here is put into hay, that you could produce enough to winter and operate this as a year around operation.

Q. If that were done, what do you think the carrying capacity of the range would be?

A. Well, my judgment on there would be be-

(Testimony of C. Marc Miller.)

tween 800 and a thousand head, and I have used for my figure, however, a thousand head on here.

Q. When you made your statement about the raising of hay on the area there along Cold Creek, do you mean just on the crop land that has been broken out as of now?

A. Well, of course, there is possibility of additional land there to be broken out. It could be done. If I was making any suggestion, that was one of the things I would suggest that they do, put all of it to hay and break out some more land to hay.

Q. Where would this potential crop land appear?

A. I think continually to the west from the present operation towards the break between Selah Creek and Cold Creek where the creeks originate. There is considerable level land there, keeping also in mind that you must have equipment, you must be close to your headquarters, and that would be a continuation of your area in here.

Also, I say for hay in that, if you notice, the very spotted nature of this crop land in field. [288] They get down to very small fields, 9 acres, 8 acres, 12 acres, in a wheat area, and these gentlemen, I know, are wheat farmers, but I think they will agree that most farmers in wheat land wouldn't bother with that small acreage, but in this area it becomes of value because you can raise hay in there and that is why I think it is of a greater value to this ranch as hay land rather than wheat land.

Q. If you did not raise hay for feed on that

(Testimony of C. Marc Miller.)

crop land, what would you have to do with your cattle or sheep?

A. Have to take your cattle off of there and remove them.

Q. For about how many months of the year?

A. I think all of the entire winter months, and that would be, depending upon your season, but I would think from November or later until probably the last of February, into March, three or four months, anyway.

Q. Would it be feasible to bring in the feed?

A. Oh, yes, surely, but that gets to be an expensive operation and it is a matter of whether it is economic to do so or not.

Q. From your estimation, then, would it be profitable to devote all of that——

Mr. Swanson: Now, counsel objects to my mention of the word "profit" any time I use the word "profit." Now he is going into the profit here, would it be profitable, would [289] it be economic. I except to it and I ask that it be stricken, your Honor.

The Court: I think the objection will be overruled. He can give his reason, he is telling why he thinks that is the highest and best use.

Mr. Hull: I will reframe my question.

The Court: All right.

Mr. Hull: To avoid any mention of profit. I don't have that in mind at all.

Q. But in the sense that we are talking about highest and best use, then, would the highest and

(Testimony of C. Marc Miller.)

best use be to use that entire crop land area, potential and what is under cultivation, for raising wheat?

A. Well, if you would do that, your ranch would be so out of balance that your range land would not have the value that it has attached to an operation which has feed for winter there.

Q. I see. Now, did you find any crop land under cultivation in the northern or Rothrock area?

A. No, sir.

Q. Do you consider in your opinion that there is any crop land potentially usable in that area on the basis of what you have previously stated?

A. There is land at the lower toes or foothill of the Umtanum Ridge which would lend itself and the soil is so [290] you could raise grain, similar to this, but it is very small, I mean the areas are very small, and you are removed from your operation and the access to it is over a very windy, steep mountainous road to take equipment from your ranch over. I don't think it would be a practical operation to put one in there.

Q. From your observation, how many acres would you state there are in crop land or were as of February, 1954 under cultivation?

A. Well, I estimated that to be a thousand acres of ground. It is slightly over that after I checked with the aerial photos which were furnished me which showed the fields I had walked over. It broke out to be a 1,034 and a fraction acres, I believe, but I had used a thousand acres of ground roughly.

(Testimony of C. Marc Miller.)

Q. Did that figure coincide with your own observation on the ground? A. Yes, sir.

Q. Your own estimate?

A. It was slightly more than I had figured. I had roughed it out at approximately a thousand acres.

Q. From your observation, how many acres of potential crop land would you say there exists to the west along Cold Creek?

A. Well, Mr. Hull, I made no estimate of that. There are [291] several reasons for not making an estimate of that.

Q. Why did you not?

A. I have handled the sale of this kind of range land for a number of years, and although owners, purchasers, buyers, have gone over an area like this and said, "Well, I think there is some additional land there," when they buy the land and when they negotiate for it, they pay for it as is. If there is something additional, they don't pay anything additional for it. It is not figured in the appraisal or the negotiations or the price on the property.

Q. I see.

A. As evidence, the sale of the very property itself, although there was land in cultivation on the Coffin Ranch, it sold and the negotiations were on a straight price, straight through per acre.

Q. I see.

A. No difference in value for the range land or for the crop land or for the different kind of range

(Testimony of C. Marc Miller.)

land, and practically all of your ranges are sold that way.

Q. Now, from your observation and experience and familiarity with this type of ownership in the state, are there other ranch layouts similar to this in size in the vicinity?

A. Yes, there have been and there and I [292] made a check of them and I knew of some. I think particularly in keeping on comparable sales, you should stay as close as you can to something that is comparable, and I think if we continue along the breaks of the Columbia River, we will have a very comparable sale and that is the sale from Coffin Brothers to Dilling of somewhat over 40,000 acres of ground between the Vantage Bridge and Wenatchee on the west side of the river.

Now, there were several things in that sale that you should be apprised of. That land ran from an elevation of approximately 600 feet to 6,000 feet. In its higher regions it had timber on it. The timber had been negotiated for and reserved, therefore leaving only the land and the range.

Q. Pardon me, sir, but what was the year of that transaction? The date, rather?

A. That was August 31, 1951, and there was 40,049.34 acres. It sold for $6.50 per acre.

Mr. Swanson: How many acres?

A. Pardon?

Mr. Swanson: How many acres?

A. 40,049.34.

Q. (By Mr. Hull): 40,049?

(Testimony of C. Marc Miller.)

A. Yes, sir. The full consideration was $240,296.

Q. And you compute the price per acre at what?

A. Pardon, sir?

The Court: The price per acre?

A. $6.50 per acre.

Q. (By Mr. Hull): Thank you.

A. There was one other provision that you should be apprised of. Coffin Sheep Company owned quite a band of sheep. The Dilling people were not going to run sheep on there, they intended to lease it. They agreed to lease for the next three years the range to the Coffins at the going price for range land at that time.

Q. I see.

A. So although the sale was a sale, a cash sale completely across the board, the lease to the seller was for the same price as anyone else would pay for the range.

There was also in that area about 1,600 acres of crop land.

Q. You have been on this tract?

A. Yes, sir, we had the property for sale.

Q. Sir?

A. We had the property for sale by Coffin.

Q. I see.

A. That was not an exclusive listing, that was a general listing.

Q. You had been on the property and talked to the principals? [294] A. Yes, sir.

Q. There were 1,600 acres of crop land included?

A. Approximately 1,600. There was slightly less

(Testimony of C. Marc Miller.)

than 2,000 acres of crop land. It might have been 1,800.

Q. And were there any improvements?

A. Improvements were minor. There was a house and a headquarters and there was some leased land there, but the buildings were minor on there.

Q. Were the improvements at all comparable as to that land and the Phillips-Haggerty tract improvements?

A. No, the Phillips and Haggerty buildings, although they are old, are very usable and adequate for the other operation on there. The buildings were not as good as Phillips and Haggerty, though.

Q. And did you arrive at any breakdown of the valuation placed by the principals in that sale as to the crop land?

A. No, sir, the only breakdown that was ever discussed was the fact that they paid $6.50 an acre straight through, crop land and all.

Mr. Swanson: Discussed by you?

A. Yes, sir, discussed by me with the sellers of the property.

Q. (By Mr. Hull): I will ask you, is that a common or uncommon method of arriving at the sale? [295]

A. That is the most common method used of large range land areas. The other example of when it is not used is the sale of the Savage Bar 14 Ranch at Ellensburg, which is comparable in a different way to this property, but in that it runs a thousand

(Testimony of C. Marc Miller.)

head of cattle, but it has irrigated land attached to it which produces feed for that.

Q. When was that property sold?

A. September 15, 1955.

Mr. Swanson: If your Honor please, now I believe the rule is that these are sales on contract or for cash and cannot be traced and involve trades. I think that Bar 14 counsel knows is that type of a transaction, trades for property in San Diego and San Francisco and relative bargaining that we don't know anything about here.

A. I think you are mistaken, counsel.

Q. (By Mr. Hull): Is that true, Mr. Miller?

A. My understanding is that the property was transferred for cash.

Mr. Swanson: That is your testimony?

A. Yes, sir, from Mr. Savage, the seller.

Q. (By Mr. Hull): You talked to Mr. Savage?

A. We had the property for sale, sir, we were paid a commission out of the sale of this property.

Q. Then, you are in possession of material facts, are you [296] not?

A. In so far as the transfer, yes. There was a previous deal that maybe counsel is referring to in which a trade had been offered for this involving property in San Francisco and San Diego, but that deal was not made. We had been negotiating for that in our office in Seattle, but it was not completed.

Q. Where is this ranch, this Savage Ranch, located?

(Testimony of C. Marc Miller.)

A. The Savage Ranch is located in the Ellensburg Valley to the north and east of Ellensburg, approximately—well, there is two different areas that are not contiguous. I would say about 8 to 10, 12 miles northeast of Ellensburg.

Q. And how many acres involved?

A. There were 6,300 acres of range land, a thousand acres of irrigated land, or a total of 7,300 acres of land.

Q. Now, you have been over that property, then?

A. Yes, sir.

Q. You are well familiar with it. What improvements were included in the transaction or other considerations?

A. Well, it was a very substantial ranch. We prepared quite a sizeable brochure on it involving six pages. The buildings were insured and equipment was insured for over $130,000. The properties included a big ranch house, a large caretaker's or Manager's house, four [297] houses for help, large barns, corrals. It was a very substantial ranch.

Mr. Swanson: Well, I move this property be not considered, then. Your Honor, this isn't the kind of a property that we are concerned with here. We are not concerned with $100,000 worth of improvements, a big dude ranch, which this was.

Mr. Hull: I think I may by opportunity to further examine bring out where the comparability comes in, your Honor.

The Court: Very well.

Q. (By Mr. Hull): I think you mentioned a lit-

(Testimony of C. Marc Miller.)

tle while previously that you were referring to this ranch particularly because of carrying capacity, is that correct?

A. Yes. A cattleman looking for a place to operate for a thousand head of cattle has a limited number of places where he can find that. There are two ways of operating, either on a great deal of range land with some winter feed or on range land and some cultivated alfalfa or irrigated pasture. The trend in the last few years has been to the irrigated pasture. Most of the cattlemen have moved to irrigated pasture.

When the cattleman is thinking of buying land, he is thinking of having an area that will support so [298] many head of cattle and the most economical way of doing that, and they have found the most economical way is to have irrigated pasture in connection with their range, and so in my judgment this is very comparable in that it supports the same number of head as this property could probably support.

The Court: When was this sale? I didn't get that.

A. September of this year, sir.

The Court: September, 1955. Where is it?

A. It is in Ellensburg.

The Court: I see. All right, go ahead.

Mr. Swanson: To whom?

A. To L. A. Manly.

The Court: What was the acreage, Mr. Miller?

A. 7,300 acres, I believe.

(Testimony of C. Marc Miller.)

The Court: Well, all right, go ahead.

Q. (By Mr. Hull): What do you compute the selling price?

The Court: Pardon me, it is time to take another recess here. I think we better take one. We are going to run, as I said, until about 12:30, so the jury will be excused for another ten minute recess.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I might say for the benefit of both counsel here that this matter of where to draw the line in [299] allowing an expert to bring in evidence of what he considers comparable sales is a difficult matter. In the past, if it comes within the time and distance limits that the Court has fixed or has indicated to counsel have been fixed, I have been inclined to leave it to the jury to determine the comparability or the degree of comparability, if any they find.

The witness is an expert, the Court is not, and if the witness says, "I, as an expert, consider this comparable sufficiently to influence my judgment as to value," it is difficult for the Court to put his non-expert judgment up against the expert's expert judgment and say, "No, it isn't and I am not going to let it in." I suppose there would come a time if we tried to bring in extreme examples where the Court would have to say, "No, that isn't, as a matter of law, in any wise comparable and cannot be admitted."

Now on the basis of that, Mr. Swanson, I will

(Testimony of C. Marc Miller.)

hear from you. I make these prior observations not that I have definitely made up my mind or irrevocably made up my mind, but simply to try to shorten the matter by indicating what my ideas are on it. Then I will hear you and make my final judgment afterward.

Mr. Swanson: I will again at the proper time object to the use of this sale and reference to it. It is a sale [300] for $330,000 of 7,300 acres, as I understand the witness. $117,000, as I understand the witness, is the value of the buildings, is that not right, the insured value?

A. Approximately.

The Court: What does that leave for the land? How much an acre?

A. Well, there is the thousand acres of irrigated land and the range land, and it leaves $100 an acre for the irrigated land, some of it, $50 an acre for some, and $7 per acre for the range land.

The Court: Well, all right.

Mr. Swanson: Now going on, there is a lot of spreads in Ellensburg with that valley land, lots of irrigated land association with them that have been sold and they have some range land incident to them, there is the Cook sale and several of them, but they are not comparable as a matter of law because it is an entirely different type of land. Here are 7,300 acres being compared with 33,000 acres, 1,000 of the 7,300 being highly developed irrigated land and $117,000 of the $300,000, or one-third of the

(Testimony of C. Marc Miller.)

whole sales price, being the value of buildings, a special kind and setup of buildings.

As a matter of law, I think, your Honor, there is a limit to which we can go. Now, if this is allowed, then I must bring in irrigated land sales where there is a [301] thousand head capacity, and we can get lots of them up in Ellensburg. They are not comparable but we can get them. They are there and they——

The Court: Well, as I understand it, the contention is not here that this ranch in Ellensburg, which is the subject of the inquiry here now, is comparable as a unit to the Phillips-Haggerty case in suit here, but that there is a sufficient similarity to the range land to compare the range land of that place with the range land here.

Now, we have got a 32,000 acre place, 36,000, I think it is altogether, and you don't find very many of them around, and I think that counsel on both sides is going to have to resort to some extent, I think, to breaking this down into range land and crop land and bringing in what they consider to be comparable range land sales and comparable wheat land sales. I suspect that counsel will go to the Horse Heaven country or some place where there is some pretty good wheat land and bring in comparable sales of wheat land. Now, if you take a wheat ranch over in the Big Bend or down here in the Horse Heaven, that isn't comparable to this Phillips-Haggerty Ranch, by no stretch of the imagination could it be, and yet if your expert says

(Testimony of C. Marc Miller.)

this wheat land compares favorably with the wheat land on Phillips-Haggerty, this wheat land sold for so much, [302] therefore this should be, I think that is a fair basis of comparison.

Mr. Swanson: That's right, but it won't be buried down in the sale of 7,300 acres, a little part of that for range land, buried down in a $330,000 valuation as a small part assessable to range land. That is exercising a long degree of discretion to try to find what that range land is worth to that property.

The Court: Mr. Hull.

Mr. Hull: It seems to me that counsel's complaint might be better taken if he wasn't obviously depending on a showing that there was a lot of crop land figures in this Phillips-Haggerty tract and, as the Court has said, there is obviously going to be testimony as to the value of crop land as an isolated thing.

Now, it isn't possible, in other words, to find another place just like this one, anyway. We don't have that big a spread anywhere in pure range land.

The Court: And I think also it might be difficult to find range land sold in large quantity by itself. It is usually sold in connection with either some crop land or some irrigated land or something else for the carrying capacity.

Mr. Hull: That's right, that is true, and that is where this thing ties in, your Honor, with the carrying [303] capacity that this witness is talking about. If a man is in the market to sell or to buy, that is one of the things he is going to have to take into

(Testimony of C. Marc Miller.)

consideration and he will weigh the kind of land such as the Savage Ranch against this as part of the determination.

The Court: I think if counsel can find some comparable wheat land or what his expert says is comparable wheat land, it wouldn't make the comparable sale inadmissible because it might have more improvements or some fancy grain bins or barns or farm machinery included in the sale. If you could segregate it out fairly, I think you would be entitled to show it.

I think this is getting close to the line, I should think, but I think it still is within the realm where it is a matter for the jury to determine whether or not it is comparable and to what extent.

Mr. Swanson: For the record, may I make an objection after the jury comes in?

The Court: Yes, I think you should to keep your record.

Court will recess for ten minutes.

(Whereupon, a short recess was taken.)

The Court: Sorry to keep you waiting. I had to go put through a long-distance call to Spokane, delayed me somewhat. [304]

All right, go ahead, Mr. Hull.

(Whereupon, the following proceedings were had in the presence of the jury:)

Q. (By Mr. Hull): Mr. Miller, then what was the over-all selling price on the Savage Ranch property that you were just talking about?

A. $339,000, including equipment, stock and

(Testimony of C. Marc Miller.)

land. 400 head — no, 600 head of cattle went with that deal.

Q. And the range lands, and what do you compute——

Mr. Swanson: Just a minute. How much range land and how much irrigated land?

Mr. Hull: He has already testified, I believe, that there was 6,300 acres of range land.

A. Yes, sir.

Q. And a thousand acres of irrigated, a total of 7,300 acres.

A. The owner placed the value on the range land in his negotiations at $7 an acre, and that is exactly the way it figures out.

Q. $7 per acre? A. Yes, sir.

Q. Do you wish to refer to any other sales that you have had in mind in arriving at your computations in this case?

A. Yes. I was quite familiar with, and have been over [305] several times, the property which was sold by Stamphley to Weitz. We at one time had the property for sale and I showed it several times for sale. I had nothing, however, to do with the sale to Ulrich and Weitz. The property was sold, however, March 6, 1953, and it had 8,720 acres of land, including at that time over 500 acres of land in cultivation. It has a nice headquarters building, set of buildings, including a residence with a family orchard surrounding it, a large barn and machine shop, blacksmith shop, lambing sheds, other buildings at the headquarters. To the rear of the head-

(Testimony of C. Marc Miller.)

quarters is a large reservoir from which they take their water for domestic purposes—I mean for irrigation purposes—and that water is from a developed well up the canyon beyond that. There are other developed water holes, I think four others on the place, if I remember.

The land is very close to this property of Phillips and Haggerty, being from three to 10 miles south through the entire spread.

I think it is a very comparable sale, and that property sold for a figure of exactly $10 per acre straight through, including the cultivated land, the improvements and all.

This is one of the sales which I wish to cite as [306] supporting the fact that these ranches are sold for a straight figure, straight through, regardless of how much is in cultivation.

Q. Is there any other such comparison you wish to make?

A. I also called on Sam Andrews and went over the ranch in Grant County which was sold to the Sievercropp Brothers of Ephrata. That ranch is a rectangular tract of ground. It is completely enclosed in hog-tight fence and cross fenced. It is about 10 miles long running westerly from about a mile and a half west of Ephrata, and it is the large range just north of the irrigation canal and irrigated lands around Winchester to Ephrata in Grant County.

It is a very accessable piece, a very desirable piece of property, and the equipment, the buildings, the

(Testimony of C. Marc Miller.)

land, was all sold, and Sam Andrews was a very good operator, kept everything in good shape, and the property was in excellent condition when it was sold.

Q. And what was the date of the sale?

A. That sale was October 8, 1953. It contained 8,840 acres and the entire price was $200,000.

Q. Did that ranch include any crop land?

A. Yes, it included 1,140 acres of crop land at that time. Since then there has been considerable more land put in dry land farm. [307]

Q. And was the balance then of 8,840 acres, or roughly 7,700 acres, in range land?

A. Yes, sir. The seller expressed that there was considerable more crop land which he had not broken out in this sale. He made a special point of that.

Q. Can you give us——

A. In talking with him as to the sales price, his figure was that the range land sold for $10 per acre, and that is the way the sales breaks down.

Q. $10 per acre? A. Yes, sir.

Mr. Hull: Would you mark these for identification, please?

The Clerk: They will be Exhibits 45, 46 and 47.

Mr. Swanson: This witness didn't take the pictures, but I have no objection if he identifies the subject matter.

The Court: All right.

Q. (By Mr. Hull): Showing you Identifications 42——

The Court: 45, 46, 47.

(Testimony of C. Marc Miller.)

Q. (By Mr. Hull): ——45, 46 and 47, do you know who took these pictures?

A. Yes, sir.

Q. By who?

A. Mr. Conner took those pictures. [308]

Q. Were you with him when he took them?

A. That's right.

Q. And do they fairly represent the areas depicted as you saw them on the date taken?

A. Yes. I had to go back to the ranch to talk to one of the men there that I had not had an opportunity to see, and while I was going back there, Mr. Conner went with me to check this information also, and when we started to get into the ranch, I said, "That would be a beautiful picture," and he said, "I think I will take it." So that is the way that picture was taken.

Mr. Swanson: Your Honor, just the answers to the questions are all we need here. We are pressed for time and I think all this extraneous matter——

The Court: Yes.

Mr. Hull: One further identifying question:

Q. Were these pictures taken on the Sievercropp property that you have just referred to?

A. Yes, sir.

Mr. Hull: I will offer Nos. 45, 46 and 47 in evidence.

Mr. Swanson: No objection.

The Court: They will be admitted. [309]

(Whereupon, the said photographs were admitted in evidence as Plaintiff's Exhibits Nos. 45, 46 and 47.)

(Testimony of C. Marc Miller.)

Q. (By Mr. Hull): Would you take these then and by number explain to the jury what they depict and show them the pictures?

A. No. 47 is a picture taken from the rear of the ranch headquarters looking eastward across the barnyard and front part of the picture and showing the range land to the rear.

Picture No. 45 is a picture taken at the road near the entrance to the headquarters buildings showing the buildings at the headquarters and the cultivated field in the foreground.

Picture No. 46 was taken along the ridge of the hills looking northerly from approximately the center of the ownership, showing the range land to the left and the cultivated land to the right.

Q. Are those all the specific sales you want to refer to, or do you have any others?

A. I inspected several other properties. I believe those are all of the sales that I need to refer to, excepting I did inspect several of those that Mr. Conner referred to and did consider them.

Q. In all, you have considered quite a number, have you not? [310]

A. Yes. And most of them, I would say, within an area, a distance of 15 or 20 miles of the ranch itself.

Q. I assume that you heard previous testimony describing, among other things, the improvements on the Phillips-Haggerty area? A. Yes, sir.

Q. Do you have anything that you wish to add to that?

(Testimony of C. Marc Miller.)

A. No, I think the buildings were well described by Mr. Conner. I remember them as having seen them before previous to this last year. Of course, when they were occupied, there was grass around there and they looked better than they do now.

Q. Yes.

A. When they were occupied, there was a small area of garden around there, too, so it gave an appearance of much better habitation prior to looking at it now when it is abandoned.

Q. I think you have referred to the fencing that you have observed on the land? A. Yes, sir.

Q. What as to the sources of water and their adequacy?

A. Well, I think the southern part of the range has, of course, more water than the northern part. There are two good springs in the northern or Rothrock area, but [311] it is not as well watered in the northern end.

Q. Have you also made yourself familiar with the area shown on that map now before us in blue, the remainder of the Phillips-Haggerty ownership not taken in fee in this case?

A. Yes, sir, I have.

Q. Can you tell us a little about it?

A. The property is cut by Cold Creek through the center running east and west. The elevation is lower than all of the other ownership with the exception of the lower part of the Rothrock. The elevation runs, I would think, somewhere between 1,500 feet in the center, rising to the north to the

(Testimony of C. Marc Miller.)

high part of the crest probably as high as 3,000 feet in there. It is mostly in a lower rainfall belt region with less precipitation, less forage on the ground, mostly sage brush and cheat grass.

Q. Now, have you considered the element of that acreage you have just spoken of remaining in the Phillips-Haggerty ownership in connection with your valuation of the fee taking in this case?

A. Yes, I have.

Q. And what consideration do you give to it in that respect?

A. Well, with that blue area added to the ownership, it becomes a part of the ranch operation and has a value [312] in connection with that operation. When you take the headquarters away from it and the better land away from it and the water sources away from it, it becomes of a great deal less value, and I think it has been severely damaged by the taking of the other land by the government.

Q. And you have considered that fact?

A. Yes, sir.

Q. In arriving at an opinion in this case?

A. Yes, yes.

Q. Now I will ask you, Mr. Miller, have you, on the basis of your experience and familiarity with the subject land in this case, considering all the other factors to which you have testified, and now having specific reference to our Cause No. 892, the fee case—— A. Yes, sir.

Q. ——arrived at what in your opinion is the

(Testimony of C. Marc Miller.)

fair market value of the 33,000 plus acres taken in condemnation in that case? A. Yes, sir.

Q. As of the date of taking of February 15, 1954, upon the basis of its fair market value that date, tested by what a willing buyer, fully informed, would have bought for and a willing seller, fully informed, would have sold for on the open market for cash? [313] A. Yes, sir.

Q. And including your figure of severance as to the balance? A. Yes, sir.

Q. What is that figure? A. $335,000.

Q. Now, with reference to these other causes of action which we are also considering——

A. Yes, sir.

Q. ——have you in addition examined the premises for the purpose of arriving at a fair leasehold, annual leasehold, value as to the areas involved in the other three cases, including the element of severance, if any? A. Yes, sir.

The Court: Do I understand that this figure that Mr. Miller has just given includes severance damage in the case of 892?

A. Yes.

The Court: I see, all right.

Q. (By Mr. Hull): Having reference then first to Civil Cause No. 452, Mr. Miller.

A. Is that the one that was taken January 1, 1950?

Q. That is correct.

A. Yes, sir.

(Testimony of C. Marc Miller.)

Q. And it refers to the 4,086.69 acres outlined in blue on this Map No. 4. [314]

A. Yes, sir.

Q. You have arrived at a fair annual rental value then of that area as of the date of taking, including severance? A. Yes, sir.

Q. And what is that figure? A. $2,850.

Q. That is for the full acreage for one year, including severance? A. Yes, sir.

The Court: Sorry, I didn't get that figure, Mr. Miller?

A. $2,850.

The Court: All right.

Q. (By Mr. Hull): Now in Case No. 488?

A. Yes, sir.

Q. And here we refer to the acreage outlined on the map in brown? A. Yes, sir.

Q. Including 3,034.84 acres, the leasehold of which was under condemnation for a term beginning for one year July 1, 1950. A. Yes, sir.

Q. Have you arrived at a similar figure as to its fair lease value for one year, including severance? A. I have. [315]

Q. And that figure is what? A. $2,230.

Q. As to the third and last leasehold case, No. 762, which involves 6,868.22 acres——

A. Yes, sir.

Q. ——shown on the map in purple?

A. Yes, sir.

Q. To the northwest, the term of years taken in condemnation beginning October 28, 1952——

(Testimony of C. Marc Miller.)

A. Yes, sir.

Q. Have you arrived at a similar figure for one year's fair rental value, including severance?

A. I have.

Q. And that figure is how much?

A. $2,500.

Q. Now, as to the severance values referred to in each of the leasehold cases——

A. Yes, sir.

Q. ——if you will explain that a little further what your thinking was?

A. Yes. On the first part taken, which is in blue, you are taking from the ownership some of the highest range in the ownership and you are severing the entire ownership in leaving a tract to the west. I have figured that in the taking of that piece there, you have [316] damaged the entire rest of the ownership. In my judgment, the rental itself on the land is only $1,225, but the severance is $1,525. I pay more for the severing of the ranch than I do for the actual taking of that land itself. Then that was taken in 1950.

Now, you find yourself with the position in July of 1950 with the government in possession of this strip under lease and Phillips and Haggerty in possession of all of this (indicating) completely surrounding it, and then you are faced with the problem of placing a rental value on this piece over here which has already been severed from the ownership and on which you have paid a severance damage in this taking. Then on that you no longer

(Testimony of C. Marc Miller.)

have 36,000 acres of ground in the ownership, but you have 36,000 acres of ground less the 4,000 taken here, or a total of 32,000 acres of ground in the remaining ownership on which you figure your severance after you take the amount out which is taken in this case here. It gets quite complicated, but I will try and outline it.

You then have in my figure a rental of $759 for this, but you have taken the only high range in the southern part of the ownership, and I again have given them a severance of almost twice as much, I have given them a severance damage of $1,473 in that, because you [317] have taken that and made it continually a more unbalanced operation. Therefore, the remainder is worth, in my judgment, considerably less.

Then on the third you no longer have all of the acreage, you have the government then in possession of this in blue and this in brown, then you have Phillips and Haggerty in possession of the remaining ranch on which you have already paid a severance, on which you have already arrived at a value per acre, and you will then take this in purple from that ownership. The severance and the taking can no longer then be figured on the entire ownership but only on the remaining ownership. And in figuring it on the remaining ownership, you have 29,453 acres of ground on which to figure your rental and severance. This is farther removed from your headquarters, it doesn't serve the same purpose as the contiguous piece to the south, so in my

(Testimony of C. Marc Miller.)

breakdown of rental on here I have paid $1,370 rental on this piece of property and $1,130 severance damage taken from the rest of the ranch.

And that makes my totals.

Q. I will ask you, Mr. Miller, have you arrived at the figures that you have given to us as to the valuation of the fee and the leasehold entirely as a matter of your own judgment independently of anyone else? [318] A. Yes, sir.

Q. As a matter of fact, this is the first time I have heard your figure, isn't it?

A. You did not know what I was going to place on this property until I testified here, sir. I haven't had an opportunity to see you on it.

Q. There is one other question that goes back to the very beginning of your qualifications, Mr. Miller. I forgot to ask you if you were a member of the Real Estate Board?

A. Oh, yes, I have been a member of the Real Estate Board for over 20 years, a member of the Seattle Real Estate Board, and because of my operation in the state, I have always been a member of the state board, as well as the National Real Estate Board. [319]

* * * * *

Yakima, Washington, Monday, October 31, 1955, 10:30 o'clock a.m.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and after an off-the-record

discussion, the following proceedings were had in chambers:)

Mr. Swanson: I think that counsel for the government should be entitled to close without opening the situation as to geology, because it is only a matter of proof that is within the discretion of the trial court, which is not contested by the defendants.

I have another matter——

The Court: Then another thing, of course, is that your proof can go in and then it can be decided whether or not you have raised an issue sufficient to require him to answer.

What did you say?

Mr. Swanson: We have a matter, Ron——

Mr. Hull: Sir?

Mr. Swanson: You have a map of the Northern Pacific mineral rights.

The Court: Do you have that citation?

Mr. Hull: I am trying to get it right now. [324]

Mr. Swanson: Sure like to read it, too.

Mr. Hull: That map indicates the reserved mineral rights of the Northern Pacific and I have drawn an order based on oral stipulation of counsel and myself to that effect.

Mr. Swanson: Let's see here, I have got the order:

"The defendant Northern Pacific Railway has reserved all mineral rights in and to the following land, 5,620 acres. The Court hereby approves said stipulation and, in accordance with its previous order of October 24th entered here in——"

I don't know about that,

"——directs that determination of the value of said described mineral rights shall be excluded from trial in this court now being heard and postponed until further order of the Court."

That we have agreed upon.

Mr. Hull: The order referred to is the one based on the N. P. stipulation. Does your Honor understand it this way, we both have to sign this?

The Court: Yes, I think that is what I understood, that it is being held out and reserved out of the case without any detriment to your clients' interest, of course, [325] if it develops that the N. P. has any mineral rights.

But I was going to say so far as your map is concerned, Mr. Hull, that would become material only in case the Court decides that there is a basis of compensation on the mineral rights.

Mr. Swanson: Well, it becomes material for another reason. What if I start to prove the mineral rights, I have to prove all except these, then it would become material.

Mr. Hull: Yes, but I offer it only in the event that we get into a legal discussion on the mineral values in the area.

(Off-the-record discussion.) [326]

* * * * *

Yakima, Washington, 10 o'clock a.m., Tuesday, November 1, 1955.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being

present as before, and the following proceedings were had in chambers:)

Mr. Swanson: First, I didn't mean to affront your Honor when I brought up that state sale, and I am not bitter or anything, but I feel that it was unfair to both sides. Let's discuss it reasonably. You brought up a sale of land that preceded a state sale so as to make it look like $6.50 land and it was thereafter immediately sold to the state at a much larger sum. Well, now, that is really taking advantage. Then I can't refer to the sale because it is a state sale after that. That is really ribbing our little agreement a little bit far.

I know you didn't do it intentionally, Ron, but that is the effect on me and I get taken in court.

The Court: Well, I shouldn't think that because ultimately land winds up in a state sale or a condemnation case, that that automatically rules out any prior open and voluntary sale that may have come within the time period here that we have allowed.

Mr. Swanson: It creates a false impression in the jury's mind which I can't dispel because it was immediate. [490] That was part of the deal. It was to be sold to the state immediately and it was.

The Court: Well, if the state sale had an influence on it or could be reasonably be construed to have, I think you would be permitted to show it for that purpose if that situation develops. In other words, if somebody buys property and sells it to the state and immediately does so, I think that that could be shown.

Mr. Swanson: As a matter of fact, the Coffins were dealing with the state and I talked to them overnight, put some calls in. They were dealing with the state at the time the Dillings sold it to the state. That is why the Dillings didn't care so much because even the use of the surface was restricted from them. They didn't have the use of the surface, they didn't have the timber, so because there was immediate sale to the state, now I think it unfair to take me on that.

I didn't mean to affront your Honor. I didn't anticipate that that would be a deal that you would be bringing up.

The Court: It isn't a matter of affronting me. There is nothing personal about this either in my judicial capacity or personally; it is a matter of trying to abide by agreements that we have thoroughly and openly arrived at in pre-trial conferences here, and I don't like to see somebody make an agreement and then step out there in the courtroom and [491] disregard it and take an unfair advantage.

Mr. Swanson: Well, I don't mean to ever do that.

The Court: My feeling about it is purely a judicial feeling, not a personal feeling. I try to avoid that.

Mr. Swanson: This is my explanation and I think it is unfair to my clients to take a predecessor sale that was part of a whole transaction.

Mr. Hull: Well, apparently we are not going to be able to get through this case without our feelings

being disturbed on that subject, anyway, Walt. I expressed myself to you yesterday on another matter.

Mr. Swanson: I didn't get some maps to him on time.

Mr. Hull: I didn't think that was very fair, either.

Mr. Swanson: I didn't know you were going to stop your case so soon. That is why you didn't get them.

Mr. Hull: There is no use rehearsing all that.

The Court: Well, I think that perhaps that is my fault. In these cases, a case of this size, I think what we should do after this is to call a pretrial conference and set it all down formally for pretrial conference and abide by the rules which require a party to bring all of the documents he proposes to use and after that he will be precluded from *from* introducing unless he can show a good reason why they weren't produced at the pretrial conference. That can stop this business of one side making a disclosure and another [492] side not, because a pretrial is certainly very unfair if it is a one-way street. Certainly, both sides should disclose, not just one.

Mr. Swanson: All right, I have got that off my mind. That has been rankling, that thing. I wanted to explain why I brought up that sale and——

The Court: All right——

Mr. Swanson: ——and I still think that I am not breaking my word, any word I gave to either of you.

On this instruction on the oil, if your Honor please, if you are going to stay with that sort of talk, your Honor, after I prove that this is an active leasing area now, and it is now whereas it was not in the Martinez case, this is just he got the first lease in the area, it was almost everything was leased up by the time the government took this condemnation action, I am going to prove it is an active leasing area and the reasons why it is, if I am permitted, and that there is a value incident to mineral rights as a result of its being an active leasing area. Now, that will be my offer of proof and I think I should disclose that to you so we can both think it over in the meantime.

The Court: Have you any court anywhere, district court, state, federal, anywhere, that has recognized that sort of a value as a compensable value?

Mr. Swanson: I have had the boy look all over the [493] country on that stuff and I have too, your Honor, and there aren't any cases on either side that I have been able to find, although I told you that I did find some congressional action on it. When the property was taken away from the owners of Camp Roberts in two camps in Oklahoma in federal court, and it was known to be an active leasing area and proven to be, or offer of proof made, afterwards the congress took away from the Army and the government the lease of the mineral rights and gave them back to the land owners.

Mr. Hull: I don't think that is admissible at all.

Mr. Swanson: That isn't admissible here, I am

just telling you the facts. That is the only thing I have found.

Mr. Hull: I submit on the government's side of the question that there is law to be found contrary to counsel's contention. Certainly, there are several cases that hold unless there is the foundation established that there has been oil producing going on in the vicinity or at least discovery of commercial proportions, then these oil leases are wholly immaterial for proving of any value.

Mr. Swanson: O.K., I want to add one statement more. For eleven years there was commercial production within seven miles of this ranch of gas.

The Court: I know about that.

Mr. Swanson: For eleven years.

The Court: When did that stop? [494]

Mr. Swanson: That stopped in 1929 or '31.

Mr. Hull: The early 30's.

Mr. Swanson: Then on back for 11 years.

The Court: There hasn't been for over 30 years?

Mr. Swanson: For over 25 years.

Mr. Hull: Twenty-five years.

Mr. Swanson: Right.

The Court: Twenty-five years.

Mr. Swanson: But oil and gas is there for millions of years, you know.

The Court: Well, yes, but in commercial quantities and availability.

Well, as far as my following this instruction is concerned it is helpful to have at hand what you have said in some prior case, but, of course, a judge should be like a wild goose, every day is a new day,

and I am not bound to anything that I did even yesterday even as far as today is concerned.

Mr. Swanson: Now, that case I want to read. I haven't had a chance. Could I read it during the noon hour?

The Court: Yes.

Mr. Swanson: The volume I can't get.

The Court: Yes, we won't get to this today, I assume, anyway.

Mr. Swanson: No. [495]

The Court: Very well. [496]

* * * * *

D. EVERETT PHILLIPS

a defendant herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

By Mr. Swanson:

Q. Your name is Everett Phillips? A. Yes.

Q. Are you one of the three partners in the ownership of this tract that is being taken by the government? A. That's right.

Q. Where is your home?

A. Lind, Washington.

Q. What has been your lifetime occupation?

A. Wheat and cattle farming.

Q. Were you with your father and Mr. Haggerty when they first visited the Rothrock range with the idea of purchasing it?

A. Yes. That was when I first started in the cattle end of the business.

(Testimony of D. Everett Phillips.)

Q. Did you examine the range at that time?

A. I did. [601]

Q. What was the condition of the range at that time?

A. Very favorable, I thought, to my limited knowledge.

Q. What did it look like? Describe it?

A. Looked awful big. It looked like it would be quite a potential of farm ground. There was a lot of big, husky bunch grass. Whenever you find that, it is a good indication that there is suitable soil for wheat farming.

Q. Did you examine the soil as to a comparison between that and Ritzville and Lind?

A. Yes, when you crumbled it, it felt very much like the soil up at our home near Lind.

Q. Did you examine, dig into the soil to look for moisture conditions?

A. Yes, that is one of the things I was raised to do. If soil doesn't have any moisture down a few inches below the surface, it, as a rule, isn't considered very good farming soil. That is the whole thing we base our farming on is the retentive powers of the soil to hold the moisture.

Q. What do you call that soil down underneath the surface of the ground?

A. I would call it subsoil.

Q. I mean, what do you call the moisture? Excuse me. A. Reserve moisture. [602]

Q. Reserve moisture. Does that reserve moisture

(Testimony of D. Everett Phillips.)

recede or advance during different seasons of the year, and, if so, how?

A. Well, yes, in the fall after the rains have wet it down thoroughly, it is from the surface on down, and later on in the season there is a definite line between the top moisture and the reserve moisture.

Q. In the fall, is there a time when the two meet, or not? Would you describe that for the jury?

A. We hope there is. If there isn't, there has been no new moisture. Down, oh, from the wheat angle, down about six to eight inches, there is moisture. You can scrape the dust off the top and there will be enough to ball up, make a ball. That is the whole theory of dry land wheat farming.

Q. Does dry land wheat farming and the way you practice it at Lind and the way you practice it at the Phillips and Haggerty Ranch here depend upon summer or spring rains?

A. No, no, they do not. In the last, I presume, twenty years, farm methods have changed enough that you are not dependent at all on spring moisture. The fall wheat sends its roots down enough that it will keep coming. The so-called crop failures in the thirties were due largely to spring-type grains. They didn't receive any spring moisture, consequently there was no yield to [603] speak of.

Q. The top of the land in July, we may assume, is dusty. Does that have any thermal power or does it cause the moisture to be retained? Explain what the situation is there.

(Testimony of D. Everett Phillips.)

A. The dusty angle would revert back to the fallow, the summer fallowing. You work the ground, cultivate, make a mulch on top. It acts like an insulating blanket and it holds the moisture from evaporating any further.

Q. When you summer fallow, then, you create a dusty condition on top. The end objects of summer fallowing, though, is to do what with regard to reserve moisture?

A. In below a twelve inch rainfall area or belt, it isn't possible to annual crop. It takes moisture from two definite seasons to support one wheat crop. Hence, the summer fallowing is to keep the weeds and other plants from robbing that moisture.

Q. And is that the way, is that an accepted practice? A. Definitely, it is.

Q. Is that a measure of assurance on the crop that you do get in the odd year? Tell whether it is or not?

A. Well, it is definitely an assurance. Without this summer fallow practice, there would be no crop to harvest unless it was an unusually wet year, one out of ten, say. [604]

Q. Under what annual rate of rainfall is marginal or submarginal land that is not good wheat land, if you know?

A. Six to seven. Below that would be submarginal.

Q. Is six to seven inch rainfall good wheat land?

A. No, no, it isn't. I said six to seven because that is all we have had in our area the last two

(Testimony of D. Everett Phillips.)

years. It isn't our average, but due to some reserve moisture in the soil, we still have had reasonable wheat crops.

The Clerk: Defendants' Exhibit 60 for identification.

Q. (By Mr. Swanson): Were you out on this range in July of 1954, the Rothrock range you were describing? A. That's right.

Q. Did you have occasion to test the reserve moisture at that time?

A. Yes, to settle an argument.

Q. With me. What is that picture?

A. That is a picture on the lower end of the Rothrock, about a quarter of a mile from where that old trail drops down into the old sheep camp at the lower end of Sourdough. We stopped on the lower end there and dug. Surprisingly to some of the parties present, down ten inches was enough moisture to make a ball of moist dirt.

Q. Now, who was present?

A. Mr. Urquhart, Mr. Swanson and myself.

Q. Was I the argumentative one? Does this picture—— [605]

A Juror: Did somebody turn the heat off in here?

Mr. Swanson: Your Honor, I noticed that too.

(Off-the-record discussion.)

The Court: I will recess for five minutes and see if we can't get something done.

(Whereupon a short recess was taken.)

(Testimony of D. Everett Phillips.)

Q. (By Mr. Swanson): Mr. Phillips, you were present when Identification No. 60 was taken?

A. Yes.

Q. And it fairly depicts what is apparent on the picture? A. Yes.

Mr. Swanson: I offer Identification No. 60.

Mr. Hull: No objection, counsel, if you will locate it a little bit.

Q. (By Mr. Swanson): Oh, counsel wants me to locate it. Would you make a mark on any one of these maps, preferably our own down here, where this was taken?

A. It was taken near the road just north of Sourdough Canyon, to the best of my recollection. It would be right in this area (indicating).

Q. Make a little circle there. Was it in the bottom of a canyon or out in the flat or on the side of a hill with reference to such topography? Would you describe it?

A. It would be on a ridge, comparatively flat, gentle sloping ridge. [606]

Q. Now, the ball that is in the man's hand is what? What makes it that way?

A. There is enough reserve moisture in it that it will cling together. In our wheat area, we always figure that if submoisture will cling together when you squeeze it enough that it doesn't fall apart when you toss it in the air, that is sufficient moisture to bring up fall grain.

The Court: For the record, the exhibit will be admitted.

(Testimony of D. Everett Phillips.)

Mr. Swanson: Oh, I'm sorry.

The Court: That's all right.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 60.)

Q. (By Mr. Swanson): Now, in 1949, you looked at that area and made these tests, did you?

A. Yes. A wheat farmer by nature goes stumbling along kicking the soil.

Q. Did you go over the range land at that time, up to the north, over to the west?

A. We rode the general area horseback that day.

Q. And what did you find in the way of water availability for stock?

A. Surprisingly well-watered for that type of range. Being [607] the first time we had ever been on it, we were even pleasantly surprised at the number of springs.

Q. Was there any other type of water besides springs?

A. Intermittent running water in the canyon bottoms.

Q. Now, I want to ask you to describe why you say it was intermittent running?

A. Well, that seems to be one of the characteristics of this country. Why, I don't know, but the water will run along and apparently it will hit a fault in the rocks or something and it will sink out of sight for maybe a few hundred yards, maybe half a mile. Lower down the creek bed, it will rise up

(Testimony of D. Everett Phillips.)

and flow visibly for another area, then maybe fall again.

Q. For how long a period during the year-around cycle does it flow in those places where you see it?

A. Well, most of those that I referred to were year around with the exception of the spring of the year. They would probably run during the run-off season, they would run constantly.

Q. These springs, were they year around or just intermittent?

A. No, most of them are year around springs.

Q. And with reference to each section of land, were there springs or not with reference to each section of land? What was their spread, in other words? [608]

A. Oh, it can't be pinpointed down a spring every section, of course, but the range was well watered. The cattle, I would say a maximum of a mile and a half was the furtherest they ever had to go to water. There was enough water that we got by without the spring development that could be done.

Q. Then when did you first see the Coffin ranch to the south? Was it on that occasion?

A. On that occasion, we saw very little. We just trucked our horses up to the Coffin buildings and rode over the hill. This was in the spring of '48 I refer to. Then in the spring of '49, we came to look at the Coffin ranch.

(Testimony of D. Everett Phillips.)

Q. When did you first discover the wheat potential of the Coffin ranch?

A. Well, there was visible wheat growing when we saw the Coffin ranch. The potential, of course, goes right along with the visible.

Q. You discovered it at that time?

A. That's right, in the spring of '49.

Q. Was it you or your father that discovered it?

A. I follow my father's lead.

Q. The Bailey ranch, when did you first see that?

A. At the same time, in the spring of '49. The Coffin lands almost surround the Bailey. Coming up the road, you go [609] right by the Bailey place. At that time, Bailey still lived there.

Q. You purchased this range, did you, from the three owners then? A. That's right.

Q. Is it true, as counsel brought out, that you bought it at range land prices?

A. Yes, that is one reason why the sales were all quite close together. We realized it as potential farm ground and naturally we made the deals as soon as we could.

Q. Was the Coffin and the Bailey ranches as well watered as the Rothrock ranch?

A. I would say so, yes. Cold Creek——

Q. Go ahead.

A. Cold Creek waters the big end of the Coffin Ranch.

Q. Are there dams possible in Cold Creek to make permanent storage?

(Testimony of D. Everett Phillips.)

A. Yes, very possible. There would probably be 200 acres that could be irrigated, rill or flood irrigated, from a series of dams in Cold Creek. That would be no problem at all.

Q. You were or were not interested in irrigating any land?

A. It was discussed along with our ideas of developing the ranch before we started hearing rumors of the Army coming in. [610]

Q. When you buy a spread of this size, does it or does it not take an appreciable time to acquaint yourself with it?

A. Oh, very definitely. It is hard to put a time on something like that. Sometimes you think, well, I will just spend a week getting acquainted, but that doesn't happen. You just become acquainted with it through your work. Seems like a fellow doesn't have time to just drop everything and get acquainted with a place. It comes gradually.

Q. Over what period of years would you estimate the proper development of this ranch?

A. Oh, it would probably take four to five years to properly develop it.

Q. Did you ever have a chance to develop it like that?

A. No, no, we hadn't been there too long before we started hearing rumors that they were going to reactivate that firing.

Q. After you had been there how long did they actually take their first bite out of your range?

(Testimony of D. Everett Phillips.)

A. We had occupied it less than a year when they look the first bite.

Q. You bought the first property in what year?

A. I believe that was January, 1950. [611]

Q. Now, wait a minute, the Rothrock range, when did you first buy it?

A. Oh, pardon me, I thought you said when did they put you off.

Q. No, no, I'm sorry. This room is hard to hear in. When did you first buy any of this property?

A. June of 1948.

Q. Of '48. When did you first put cattle on it?

A. In the later spring, a year later, in the later spring of '49, we started moving cattle down.

Q. Did you move cattle down from what location? A. From the Lind ranch.

Q. How many cattle did you put on in 1949 then?

A. Oh, not too many. Somewhere around 500 head of cows.

Q. And did you add to that in 1950?

A. Yes, that's right. We added about that many more the next year.

Q. Now, I understand that you moved off your cattle in fifty what, '52?

A. In the fall of '52, yes.

Q. Now, did you have the beginnings of a working herd, and, if you did, would you describe how you worked your herd on this ranch from the beginning, the first allotment of cattle, until you moved off your cattle in '52?

(Testimony of D. Everett Phillips.)

A. Yes, we thought we had a very nice working unit. As it [612] was described earlier, we wintered down on the lower end of Cold Creek where the feed yards are. It was about the center of our winter pasture and we had hay. We would chop the hay, fill that rack with chopped hay. The cattle were out browsing and grazing when the snow wasn't too deep. They would come in to feed as the storms would drive them in. Sometimes we wouldn't feed for two weeks at a time. Then in the spring, we would move them over the hill over the Filey road down to the river side, keep them spread out. We kept a rider with them all the time for range control. We didn't have fences enough so we had to do our control with horse, man on horseback, moving the cattle around, spreading them out. Then they would gradually, as the summer came on, they would gradually go to the higher ground, and then it was in reverse. The rider, instead of shoving them back toward the river, would keep pushing them away from the river and they would be up on the higher ground until, oh, right after harvest time. Then they would be pushed back up over the hill. Right near the switchback road was where we would come up. We would come up Sourdough Canyon with them. Then they would be in the west pasture, we called it the Born Springs pasture. That was our tentative idea, anyway, until this leasehold business started in. Then along in [613] October, we would run them in, the latter part of September or October, we would run them in on the stubblefield. It

(Testimony of D. Everett Phillips.)

had generally softened up by then, the cattle would eat the stubble, what stubble there was, what few wheat heads, and, of course, around the outlying wheat fields there was always wonderful grass that by necessity was fenced out with the farm land, and so on down to the east end again to complete the rotation. They would be moved down along in the latter part of November after the calves were weaned.

Q. Now, each year, did you have a crop of fat cattle for sale?

A. Yes, I neglected to mention we would brand over on the Priest Rapids side where we had an extension onto the corrals there at Priest Rapids. We did our branding there and then in the fall after we got back over the hill to the main ranch, this crop of calves would be weaned and we would truck them to Lind to wean them up there. It takes a couple of weeks to wean them good. They have to be separated from their mothers. They would be marketed near Lind, Davenport and Moses Lake, or part of the time fed out over that winter, marketed the next spring.

Q. And did you have an annual sale of cattle then from this range, of beef from this range? [614]

A. That's right, there was the calf crop and a few yearlings, generally, the tag end of the calf crop to sell every year.

Q. Have you records of the amount of such sales?

A. Yes, we have records. Partially, with me.

(Testimony of D. Everett Phillips.)

Q. Now, don't state it, but could you state the value, the total value of the sale for each year?

A. I believe so.

Q. Now, don't answer this, because counsel wants to object: Will you state the total value or the total price received by you for the sale of cattle at the end of each season from this range?

Mr. Hull: Thank you, counsel. I do object on the ground that the question is not material to the issues in this case.

The Court: The objection will be sustained.

Q. (By Mr. Swanson): In 1952 in the spring, it has been brought out that some cattle were moved off this range. Where did you move them to?

A. By necessity of this fee taking, we had located a ranch in Oregon and we moved them to that ranch. We looked for quite a while trying to locate closer to home, but larger cattle ranches just aren't available, we found out.

Q. So the closest place you could find was Oregon, is that [615] right? A. That's right.

Q. How many head of cattle did you move to Oregon in the spring of 1952?

A. Around 300 head, as near as I can recall.

Q. And the balance of the movement to Oregon was when?

A. In the fall after harvest along in October sometime, we took everything down then, cleaned out the ranch completely.

Q. About how many head were taken down there?

(Testimony of D. Everett Phillips.)

A. Around 800 grown stuff, I believe, yearlings, bulls.

Q. In addition to the calves?

A. And the calf crop, that's right.

Q. Did you sell off a number of animals that year that weren't taken down to Oregon?

A. Yes, for interstate shipment, all the cattle had to be tested and get a health certificate, and we sold some because of that, and we had a few steers that had been carried over from the year before and they were also sold.

Q. And that interstate shipment, what was your record of poundage for transportation of beef? Approximately is all right.

A. Something over one million three or four hundred thousand pounds, I believe. [616]

Q. Now, those cattle were on your ranch, how many men did it take to operate that herd of cattle?

A. Well, that was one of the beauties of this type of a ranch, it is low overhead, low maintenance. Even in hard times, a fellow could still hold his head above water maintenance-wise. Most of the time, one man handled the cattle, another man the farm work, except when there was a big movement on, like moving them over the hill. It is quite a chore for one man to try to move a bunch of cows and calves especially up a steep hill. The calves keep wanting to go back. At that time, there was more help, fellows from the wheat ranch would be brought down to help. Most of the time, two men ran it.

(Testimony of D. Everett Phillips.)

Q. Is that operation, as operations of this size go, is that a reasonable operation, economically speaking? A. I would say very reasonable.

Q. To make it that economical, was it necessary to have fencing? A. Oh, yes.

Q. Would you describe that?

A. It would be impossible to get along without fencing. Especially on the Rothrock side, it seems as though the cattle and horses like that area, even the buffalo like it, and it was hard to keep strays out. One time we [617] rounded up, I think we had seven or eight riders that day, rounding up horses, rounded up over 300 head of wild horses. Driving through the road, you would say, well, maybe there is only 50 head. There would be a few in this canyon, a few in that pocket. And a while later, about a month or two later that same fall, we had another similar horse roundup, run out another 130 or 40 head. There were over 400 head of wild horses on that range when we moved in there, and then we fixed up what fences there were, built new fences, kept them in repair, and it was much easier to maintain the stray angle after that.

Q. How many miles of fences did you have on that ranch after you added to them and completed it?

A. Oh, altogether, with some of the holding pastures and horse and bull pastures, I believe there was 84 or 5 miles.

Q. Did that fence line, may I suggest, did it sur-

(Testimony of D. Everett Phillips.)

round the ranch? If it did, say so and then I will have you point to where it was.

A. Yes, it went around the outside, it was fenced in.

Q. Did you have cross fences?

A. Yes, yes. The original Rothrock purchase was all fenced from the Coffin and the Bailey.

Q. Now, the perimeter fencing had what to do with the [618] number of men that you had to hire?

A. Well, the first thing in the spring, of course, there was always the job of checking fencing. It might take an extra man on that for a week or two, and then after that one man. All he had to do then was keep the cattle spread out, keep from too many around one spring or too many around a place where the grass was being eaten down. He didn't have to worry about them getting out or other cattle coming in.

Q. In 1950, what was the effect of the government taking for leasehold approximately 7,000 acres of your range?

A. Very noticeably. That was some of our better range and it couldn't help but affect the operation of the ranch.

Q. What upsetting effect was there to your planned economy there of that ranch, if any?

A. Well, by necessity, we had less range for cattle. We could carry fewer numbers, and even though the first taking left a gap over on the west side, we didn't have access to it, so both takings might well

(Testimony of D. Everett Phillips.)

have been at the same date as far as use to us was concerned.

Q. Was there a guard station where there was a warning sign out or some type——

A. Not in the sense that you would imagine a guard station. There was a telephone line up there and a couple of boys in a jeep or some other vehicle stationed there at all [619] times during the day.

Q. Was there ever any direction to you to stay off of this land?

A. Oh, yes, yes. We at one time thought we would borrow some from the Army, sent a man over to fix the fence, and they ran him out.

Q. When the next taking of higher ground of 6,068 acres was taken, did that disturb your operation at all?

A. You mean the Rothrock taking?

Q. Yes?

A. It would have very definitely, but it was taken after we moved our cattle out.

Q. And you moved your cattle out at whose direction?

A. Some supposed man for the Army Engineers' office out of Walla Walla. I don't recall the man's name.

Q. Now, the amount of cattle that you did run on this range were run on what part, the lower or the upper, or both?

A. The lower part in relation to the Coffin and the whole Rothrock area.

Q. Did you have it fully stocked?

(Testimony of D. Everett Phillips.)

A. No, no, we didn't. We started out with a few head, put a few more on the next year and, like I mentioned earlier, we started hearing rumors that the Army was going to reactivate so we didn't stock any heavier after [620] that. We knew we were going to have to move so we were just marking time, you might say.

Q. Was there a fence at the bottom of the Rothrock or at the bottom of the other taking other than that guard station?

A. On the Rothrock?

Q. Yes? A. On the Rothrock side?

Q. Yes? A. There was no fence, no.

Q. Was there on the other?

A. There was an existing fence between the wheat fields and what we called the west pasture. The Army used it. Apparently their line came on down through the middle of the field, but they didn't use it, didn't even force it, they just used the fence.

Q. Now, your wheat growing area was what? Was it the former wheat growing area that the Coffins developed or was it one of your own?

A. Well, that was our base, yes. We started out, when we moved on there in the spring of '49, started out with that and added to it. In the spring of '50, we plowed up quite a bit more and in '51 we plowed more.

Q. Would you point out on the map just which fingers you did use for wheat on the brown area?

A. In Section 10 on the so-called Coffin ranch, there was quite a large field, just across in 15 there

(Testimony of D. Everett Phillips.)

was one small field, two or three other fields down at a little bit lower elevation. Just south of the Coffin buildings, there was quite a field there. It tied in with the field down below the fish pond. There was a little oat field that we used to raise horse oats on just below where the old barn was, and then that was all there was right in there. There wasn't any in Section 13 plowed up.

Down at the Bailey place, there were fields on both sides of the creek in Section 18.

Q. Point out the perimeter of the field to the north there.

Mr. Hull: May I suggest, counsel, it is proper that he illustrate his testimony by marking those on the map as he describes them. It would save us a little time.

Mr. Swanson: It is going to take a long time to map out these wheat fields. I would suggest counsel would examine him that way. That won't take me but a minute.

The Court: All right.

Q. (By Mr. Swanson): Point out the perimeter of the largest wheat field there on the Bailey.

A. There was a quite sizable field straight south of the Bailey, and then on east in Section 20 and some in the [622] corner of 17.

Q. Were all of those wheat fields within the brown areas on this map? A. That's right.

Q. Now, what years did you crop that land?

A. We started cropping in '49 on the Coffin, what the existing Coffin was. We bought it for 700

(Testimony of D. Everett Phillips.)

acres of broken out land. Actually, it wasn't that much, probably four to four fifty. We broke out about as much more as what was there, thinking we had 1300, 1350 acres, but when the breakdown came the ASC office here in Yakima informed us we only had 1,087. So I guess that was it. We did most of the plowing on the Bailey in 1950. Our first crop was in '51. We just used it for hay mostly. Then in '52 we recropped the Bailey and all the Coffin stuff was in. We did that to even it up mainly so that it would all be crop one year and summer fallow the following. Then in '53, it was all summer fallow, '54 all wheat.

Q. Now, you say you cropped the Bailey range two years in a row, is that right?

A. That's right.

Q. Both years were for hay? A. Yes.

Q. Is that the hay you used for supplemental feeding in [623] the wintertime?

A. That's right. We trucked down loose hay, trucked it down to the feed yard and chopped it into the feed rack for winter feeding.

Q. Now, supplemental feeding means what?

A. It means feeding in addition to what grass and brush that the cattle can get. It is mainly necessary in the periods of heavy snowfall. We would during those times, even though the cattle would graze out, our man would feed in the morning about the same time each morning that he fed, and in the afternoon you could drive down there and it would

(Testimony of D. Everett Phillips.)

be vacated, there wouldn't be a critter around the feed yard, they would all be out grazing.

Q. Then, the supplemental feeding is not an entire ration?

A. No, no, definitely not. An entire ration would take an enormous amount of hay. Those old cows, they take a lot of hay in the wintertime.

Q. Now, is that one of the reasons why winter range is valuable?

A. Definitely. Winter range is valuable to offset the feeding. They range out, some years they require very little feeding. For example, Stewart on the north of us went ten years without feeding a bale of hay. The cattle ran up in the pockets where they were out of the [624] wind, ate the taller grass.

Q. Now, you cropped that land in '51 and '52, but not in '53, as to livestock, is that your testimony? A. Repeat the question.

Q. In '53, you did not have livestock on the ranch?

A. No, we moved out with the livestock in '52.

Q. You still had control of the ranch in '53, and did you make a lease of a part of it and what were the terms of the lease?

A. We made an emergency, so-called, lease to a man named Wiley with the stipulation that it could be revoked without any advance notice at any time.

Q. For how much money and for how long?

A. Three month period for $7,000.00.

(Testimony of D. Everett Phillips.)

Q. Did he represent that he was desperate for range, is that the point, what you mean?

A. Yes, yes, he did.

Q. Did you let anybody else in your range while you had control of it?

A. No, no, we didn't. Apparently before we moved into that area, it had been wide open. Several times we had to put the run on bands of sheep that would come wandering in there, and full of excuses, they didn't realize, or they had an agreement with Coffin. That was one thing we had to be on the lookout for constantly. [625]

Q. Since 1954 in February what has happened to the grazing, particularly of the winter areas?

A. It has been thrown open to all comers. Anyone that has stock in the area runs them in there, it seems like.

Q. And what has it done to your range for the last two years?

A. Oh, it has taken a visible toll of it, naturally. Down next to the lower elevation next to the river, it definitely has definitely taken the crop off.

Q. Is there some new feed growing or not at this time of the year down there, green?

A. Not right at the river there isn't much green growing. The lower elevation hasn't had enough rain yet. The higher elevations and up on the ridges new grass is coming very well.

Q. How do you know that there were several different owners of cattle in there?

A. Tell by the breed of cattle, for one thing.

(Testimony of D. Everett Phillips.)

Q. The brand of cattle? A. The breed.

Q. The breed?

A. There are some well-bred cattle and then in other portions of the range there are some definitely cull types of cattle, and some of the brands are visible as you drive by the road. [626]

Q. Can you tell by branding that they are owned by different owners?

A. That's right, if you can read their brand.

Q. Were there sheep in there in the last two years since you have had possession taken away from you?

A. Yes, on the river side, there were two bands.

Q. Now, along the river there are a row of sections on the breaks of the bank that go down to the river. Do you own those sections?

A. No, we had those under lease. There isn't too much feed there, but it is definitely a valuable feed in that it comes early in the spring, the snow doesn't lay there, but that lower elevation, we didn't own any land there.

Q. You found it wise not to own it?

A. That's right.

Q. Or not economic or what is the reason?

A. There wasn't enough feed on it to warrant owning it. The feed was for such a short period.

Q. Why did you own one section that went right down to the river?

A. That was available mainly, the other wasn't.

Q. Did it give you access to the river or the railroad? A. To both.

(Testimony of D. Everett Phillips.)

Mr. Hull: I object to that type of questioning as [627] being entirely leading and giving the answer to the witness and calling for a yes or no.

Mr. Swanson: Did it or didn't it give him access? He can answer.

The Court: Your question suggests what the answer should be in a good many of these questions.

Mr. Swanson: I can't avoid that entirely.

The Court: Did or didn't doesn't take the curse off of it if you indicate what you want him to answer. I think you have been leading in some of these questions.

Proceed.

Q. (By Mr. Swanson): Where do you get to the railroad? Go through what section?

A. I would have to walk over to the map to recall the section number. We could get to it mainly where the section that the road comes out on.

Q. The wheat crop that you grew and you harvested, you sowed in what year? The last one?

A. It was seeded in the early fall of '53. There had been some late spring rains and there was very good moisture down under, oh, say three inches of dust. We got almost a perfect stand by seeding, like I mentioned earlier, seeding down to the reserve moisture.

Q. How deep do your drills put the little grain of wheat?

A. It varies, anywhere from a half inch to eight inches. [628] Wheat can be covered, that is, from the top of the ground, wheat can have seven inches

(Testimony of D. Everett Phillips.)

of dirt on the kernel itself, come to a very good stand.

Q. Is that how you control the placing of the wheat where there is a moisture level?

A. That's right. We aren't dependent on rains. Rains are very seasonal. When it is time to seed, with the modern machinery, the present type of operation, you seed when you want to, not when the weather demands.

Q. Would you say that this range had ever been adapted or used in connection with modern mechanized wheat machinery? A. Definitely not.

Q. It has been suggested by counsel that the Rothrock basin wheat area is remote and inaccessable and, therefore, not valuable as wheat land. Would you address some remarks to that?

A. Well, I don't agree, naturally. It is a little removed from the main ranch as it sits now. It wouldn't be too much of a job to build a high gear road, you might say, around to it following the contour of the hills around. There could be a very adequate road to move the machinery over to it. And then, too, it is over on the other side in the middle of a large area of range that would supplement that range very well for winter [629] feeding, and on this early feeding angle, there could be worlds of pasture and, also the green wheat, to supplement the dry grass. We have made a practice of that for years. Turning the cattle in on the green wheat in the fall, they don't seem to hurt the wheat a bit, as long as it is pastured in the fall. And then, of

(Testimony of D. Everett Phillips.)

course, the stubble and the chaff left over from harvest makes excellent hay supplement.

Q. Now, is it a good practice to permit horses, for instance, to graze on the growing wheat crop in April of the year?

A. Oh, no, definitely not. In the spring it is a definite disadvantage, harmful to the wheat, to pasture it in the spring.

Q. Now, did you notice after you had lost control of this area that there were horses in any considerable quantity on your wheat areas?

A. Yes, there was quite a number of horses and cattle on the grain in the spring of '54.

The Clerk: 61.

Q. (By Mr. Swanson): I show you No. 61. Do you recognize that picture?

A. I recognize what it could be. It could be one of the wheat fields that the Cold Creek——

Q. Do you recognize the wheat field and the horse area?

A. At the time I was on it, there were more horses than that. [630] It doesn't look like the photographer got them all in.

Q. Is that what happened in your area?

A. Yes, yes, they trampled the fields bad and they were muddy.

Q. You were not present when this picture was taken, were you? A. No, no, I wasn't.

Mr. Swanson: Well, your Honor, this picture is the one we discussed in chambers. I offer No. 61.

Mr. Hull: Did this witness locate this field?

(Testimony of D. Everett Phillips.)

Mr. Swanson: You may inquire of him, counsel.

Mr. Hull: Do you know where this picture was taken, Mr. Phillips?

A. I said it could have been, I didn't say that it was. I have no knowledge as to where that was taken.

Mr. Swanson: Maybe we better withdraw the picture.

Mr. Hull: Then, I think it is not admissible.

The Court: Very well, all right.

Q. (By Mr. Swanson): Were you able to cultivate your wheat land in the winter of '53-'54?

A. No. We tried to, we put in for a permit to get in from the Army. It should have been harrowed twice and fertilized. There was a wonderful stand in despite all of the tramping and the spring grazing by the stock, but we weren't able to. Finally, the day the deadline ended, [631] they gave us a permit or indicated we could have had a permit, I should say, for two days to get in, harrow all that land twice, fertilize it, and move our machinery out. Needless to say, it wasn't cultivated.

Q. Was that impossible to do in two days?

A. Oh, definitely.

Q. What is the advantage of harrowing in the winter to the stand of wheat that you might have or disadvantage?

A. The ground cracks quite badly over the winter. It was even more so that year when the ground was soft, so many head of cattle in there, the ground kind of run together, you might say, and it

(Testimony of D. Everett Phillips.)

was very hard and cracked due to that. And when the ground cracks, if it isn't worked and sealed up, moisture dries out very fast. It would have made quite a difference in the crop. It is an accepted practice in farming to cultivate or harrow the wheat crop in the spring.

Q. That is, in the stand of growing wheat, is that right?

A. That's right, get right in there and tear it right up. The plants are husky enough that it won't hurt them any.

Q. Would the stand of wheat, the bushels of wheat to yield have been greater had you been able to do that?

A. I would say definitely without exception it would have been, when the ground is cracked there is a hard crust. [632] It is speculative as to how much more. Two to five bushel, perhaps.

Q. Was there any other handicap to the yield of bushels of wheat in this particular crop that you encountered that year?

A. None other than the stock being in there off and on all spring and the Army holding their maneuvers, digging foxholes and gun implacements and what not in the wheatfields.

Q. Have you got pictures?

A. There is a picture of some tank tracks through one field near the headquarters.

The Clerk: Defendants' Exhibit 62 for Identification.

(Testimony of D. Everett Phillips.)

Q. (By Mr. Swanson): I show you Identification No. 62 and ask if you recognize what that is?

A. Yes, that is a picture of a wheat field taken right over the top of the metal granary, showing tank tracks on the south Coffin Place field.

Q. Did you take that or were you present when the picture was taken? A. Yes, I took it.

Mr. Swanson: I offer No. 62.

Mr. Hull: No objection.

The Court: It will be admitted. [633]

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 62.)

Q. (By Mr. Swanson): That shows, you stated, the wheat fields. I notice there is a difference in color in the wheat fields. Would you explain what that is?

A. Yes. This was taken, I believe, the first or second day of July and the wheat was ripening, the more open exposed slopes were getting riper. The draws and the north slopes, the ravines, naturally a little more moisture, a little more shaded, are a little greener. It shows the difference in the spottedness. Of course, in the foreground is the sagebrush and bunch grass.

Q. And the parallel lines through the wheat fields are what?

A. They are the tank tracks I spoke of.

Q. You harvested about what time in 1954?

A. About the middle of July.

Q. How many acres did you harvest for wheat?

A. Around 800, more or less.

(Testimony of D. Everett Phillips.)

Q. How many acres did you harvest for wheat hay?

A. A little over 280, I believe, was the figure we cut for hay.

Q. Did you harvest the hay prior or subsequent to the time [634] you harvested the grain?

A. No, no, the hay was cut earlier. The hay, I believe, was—we started cutting hay, I believe, the last few days in June. There is more food value in hay when the stalk is still green than there is when it turns plumb brown. If you wait until it is almost ripe before you cut it, there is enough sap left in the stem that it will go ahead and ripen and the straw is more like the word "straw," whereas if it is cut a little greener, there is more food value in the stem and the leaves and, of course, the head will have a small shriveled kernel in it when it is cut in the dough stage.

Q. I show you Identification No. 63. Can you state what that is?

A. Yes, that is the hay baler pulled by a wheel tractor, a man riding a sled behind it to stack the bales six to eight in a pile.

Q. In the background what is shown?

A. In the background is shown two canyons with springs in them on the upper end of the Coffin Ranch.

Q. What are those bunches in the field that are shown?

A. Those are the piles of hay that I spoke of, six to eight bales to a pile.

(Testimony of D. Everett Phillips.)

Q. And where on the map approximately is this grain hay [635] situated?

A. This would be in the west half of Section 10.

Mr. Swanson: I offer No. 63.

Mr. Hull: I assume this witness took these pictures?

Mr. Swanson: Did you take this picture or were you present when it was taken?

A. Yes, I took the picture.

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 63.)

The Clerk: I have also marked 64, 65, and 66.

Q. (By Mr. Swanson): This is 64. Do you recognize what that is?

A. Yes. That is the same field looking at it from the opposite end, showing some of the trucks being loaded with hay.

Q. In the background is yet another field, or is that the same one?

A. It is a continuation of the same field. Each one of those dots in the background represents six bales of hay.

Mr. Swanson: I offer No. 64.

Mr. Hull: He took all these? [636]

Mr. Swanson: Yes.

Mr. Hull: I have no objection.

Q. (By Mr. Swanson): In the foreground in the stubble, does that represent the wheat plants?

A. That is the stubble residue, yes. This was dif-

(Testimony of D. Everett Phillips.)

ferent from our normal operation in so much that this was cut a little taller than it usually was. We were pressed for time. Normally, we would have cut this a little closer to the ground for hay purposes than we did in this.

Q. Could you have obtained more or less hay if you had cut it closer to the ground?

A. Oh, considerably more if it was cut closer to the ground. It takes a little longer to cut it though.

Q. Do you know how many bushels to the acre you did get? A. Roughly two tons to the acre.

Q. Each one of those dots in the background represents, you said, six bales?

A. Six bales, yes, that's right, where they were pulled off.

The Clerk: Has 64 been admitted?

Mr. Swanson: I offer No. 64.

The Court: You have looked at this, have you, Mr. Hull?

Mr. Swanson: Yes, he has looked at that one.

Mr. Hull: I have seen it. I have no objection.

The Court: It will be admitted then.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 64.)

Q. (By Mr. Swanson): I show you No. 65.

A. This is roughly the same picture as the other with this exception, it was taken closer to the hay. You can get a little better view of the piles, how they were slid off of the sled behind the baler.

Q. While counsel is looking at that, I show you No. 66.

(Testimony of D. Everett Phillips.)

A. This shows a picture loading hay, transporting it from one of the smaller trucks to a larger truck for transportation up to the Lind Ranch.

Q. Those trucks are owned by who?

A. They are our trucks, our ranch trucks.

Mr. Swanson: Any objection to No. 65?

Mr. Hull: No objection.

Mr. Swanson: I offer No. 65.

The Court: It will be admitted.

(Whereupon, said photograph was admitted in evidence as Defendants' Exhibit No. 65.)

Mr. Swanson: No. 66.

Mr. Hull: No objection to No. 66. [638]

The Court: It will be admitted.

(Whereupon, said photograph was admitted in evidence as Defendants' Exhibit No. 66.)

Mr. Swanson: How long are we going to run tonight?

The Court: Going to suspend as soon as the jurors get through looking at the pictures here.

Mr. Swanson: Very well, I will stop, then.

The Court: All right.

Mr. Swanson: If your Honor please, I should like a conference with your Honor and counsel for a minute afterward. I have two witnesses that have a long way to come and I am in doubt as to whether I should have them in view of our conversation.

The Court: Oh, yes. Well, I will excuse the jury then before we adjourn. The back row are not through with the pictures yet.

(Testimony of D. Everett Phillips.)

All right, I will excuse the jury then until 10 o'clock tomorrow morning.

(Whereupon the following proceedings were had out of the presence of the jury:)

Mr. Swanson: Now, your Honor, I have a witness, a geologist, from the Shell Oil Company who will testify as to the presence of the factors necessary for exploration for gas and oil. He has prepared data as to all of the [639] existing leases in this field and showing almost all the land in and about this ranch to have been leased by various major oil companies. Another man from Montana from the Carter Oil Company, which is a standard oil company, will be here if I call him to testify that he himself has bought mineral rights in such situations as the geologist will describe exist at this area on this ranch, and he himself has bought them for his personal account and for the account of leasehold mineral right companies.

Now, I hesitate to have them come all this distance just to be told they cannot open their testimony on the stand.

The Court: Yes, I understand your situation.

Mr. Swanson: There is definitely a value, I believe, to mineral rights, that it can be proven, and should be translated into some form of verdict. Our mineral rights in an active leasing area are being taken from us, definitely from us.

Now, tomorrow there will be developed, and it cannot be kept out because it isn't separated, there will be developed a number of comparable sales, in

(Testimony of D. Everett Phillips.)

each of which there are all or part of the mineral rights reserved because there are in this section approximately 30,000 acres of range land right next to [640] this Army reservation that have been sold in the last two and a half years that haven't been mentioned in this trial, all of which has either a reservation of all or part of the mineral rights.

The Court: Well, the only leases that you have are the type that you had in the Martinez case, isn't it, these revocable leases for exploration for gas and oil that can be cancelled over night at any time?

Mr. Swanson: Right. The leases have no value, your Honor.

The Court: Well, what has value, then? You haven't got beyond the leasing for exploration stage here, have you?

Mr. Swanson: The value is the fact that if major oil companies will spend money for leases. They are spending it upon their knowledge of geology. Their geology is expended in the area. Then mineral companies come in and buy part of the ownership of the owner's underneath those leases. Getting enough of a spread of them, they are certain to hit——

The Court: Have any been sold here now, anything but leases?

Mr. Swanson: I'm not sure whether any of them have been sold in this area or bought excepting as part of the purchase and sale of all these ranches that are being purchased and sold in this area.

(Testimony of D. Everett Phillips.)

Mr. Hull: As far as reservation of minerals is concerned by a seller—— [641]

Mr. Swanson: Mr. Phillips, you can get down, excuse me.

The Court: Yes, Mr. Phillips, there's no point in your sitting there unless you enjoy it.

The Witness: Oh, no.

Mr. Hull: As far as the reservation by the vendor in a sale of range land, we'll say, of a portion of the minerals is concerned, I can see no way that that would be a measure of value, because it comes under the expression of the court in that case of United States vs. Harrow, it is a transaction involving one of the persons interested in the primary speculation. He may have kept the minerals because he wanted to sit tight and see what would happen. It doesn't mean anything in that sense. It doesn't mean anything more under these circumstances we have here than if he let them all go thinking they were of no value, which could be the case, too.

I take it from the cases which we can find touching upon the subject that we have here that we must have the premise of an active, valuable region which has been developed somewhere in the near vicinity to make it worthwhile to assign a value here, and that the leases which counsel speaks of would have a market value of themselves after that first point had been shown. And now, we have neither. [642]

I didn't understand counsel's statement there with

reference to what this witness had acquired. Was it in regions similar to this?

Mr. Swanson: Exactly.

Mr. Hull: Other regions where development had gone on?

Mr. Swanson: Other regions where leases had gone on, a market developed for the mineral rights under the geology of the major companies, and some of those regions oil was never developed. However, in this region oil and gas have been developed, gas furnished for 14 years, and I will offer that as testimony.

The Court: I don't believe the oil has been developed. There has been some marsh gas found down here that petered out after a few years, and that was about 25 years ago. We have had that evidence here in one of the prior cases about the gas that was in the area or vicinity of Grandview, wasn't it?

Mr. Swanson: Oh, that, I have no evidence on that. I have evidence the Northwest Gas Company——

Mr. Hull: It was the Rattlesnake Hill development that has been testified to.

The Court: Wasn't that the same area where part of it was piped down to Grandview?

Mr. Hull: Yes, that is the one.

Mr. Swanson: From Prosser, Grandview, Sunnyside and [643] Toppenish were connected and furnished with gas.

The Court: Well, I suggest that if you wish to

get the court's ruling before you go to the expense of bringing your witnesses here, that you make an offer of proof in the absence of the jury. You may do that just before court convenes in the morning, if you wish, and get your formal statement, because I can't rule until you do formulate your statement of your offer. Your offer might be such that I would say yes, that is sufficient, but you take the responsibility then of having your witnesses bear out what you claim they will testify when they get here.

Mr. Swanson: I will take that responsibility. I will make an offer orally. Did you intend that I make it in writing?

The Court: No, no, you can make it any way you wish.

Mr. Swanson: I haven't had time to prepare it at this time.

The Court: What I had in mind, though, I thought you would wish some time to prepare it and get it definitely stated.

Mr. Swanson: In the morning, say at a quarter to 10?

The Court: Yes, about a quarter to 10, if you wish to come in, you can make it.

Mr. Swanson: I will make an offer then at a quarter [644] to ten in the morning.

The Court: That wouldn't be too late for you to get them?

Mr. Swanson: No, I could still get them. Has your Honor something else on?

The Court: I have a matter set for 9:30, argument here. I have a matter set at 9:30, but I don't think that it should take more than a quarter of an hour, so we can go ahead with the plan, anyway.

Mr. Swanson: Very well.

The Court: Court will adjourn then until tomorrow morning at 9:30.

(Whereupon the trial in the instant cause was adjourned until 9:45 a.m., Wednesday, November 2, 1955.) [645]

* * * * *

D. EVERETT PHILLIPS

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

By Mr. Swanson:

Q. Now, Mr. Phillips, how did you test this land, the depth of the farm land, when you went out with Mr. Nelson?

A. With a regular soil testing tube, had a hammer attachment on the top, get it down through the soil, brings up the soil samples every foot. You go down a foot and raise it out and clean the sample tube out, then go down another foot, and so on.

Q. I want to know if or not you verified whether this land that was classified as Ritzville loam was or was not three foot in depth and how did you do it? [647]

A. As I have just stated, with that soil sampling

(Testimony of D. Everett Phillips.)

tube. It was a six foot long tube, had a slide hammer attachment on the top to drive it down into the soil to take the samples. We sampled several places.

Q. Did you sample for depth of soil alone or for some other reason?

A. Depth of soil, type of soil, amount of moisture in the soil.

The Clerk: This is marked Defendants' Exhibit 67 for identification.

A. Mainly, one of the big things we were interested in was to see how far down the moisture was. Surprisingly, there was a lot of reserve moisture, being the end of a dry season.

Q. Well, what time of the year is the reserve moisture at its lowest level?

A. It would be after the grass or what other crops had been on. After they have finished growing and ripened, after they have taken all the moisture out.

Q. I mean as to season of the year, spring, summer, fall, winter?

A. No, it would be fall of the year.

Q. I show you Identification No. 67. What does that show?

A. That shows the depth of the soil on the Rothrock side of the range. There is no rock or any other substance [648] other than dirt.

Q. Were you present when that picture was taken? A. Yes.

(Testimony of D. Everett Phillips.)

Q. Is there a character in the picture for comparison?

A. Yes, I stood in the picture for a comparison. That was in a trench the Army had dug for a gun emplacement.

Mr. Swanson: I offer No. 67.

Q. Is the Rothrock range, the wheat basin area of the Rothrock range, one of the better areas or worse areas, comparatively, in your holding?

A. One of the better areas. That picture, incidentally, is of the same cut that the jury stopped at.

Q. Is that picture near where this was taken?

A. It was taken out of that same cut, the bank of that same cut.

Mr. Hull: I think it should be more specifically located, counsel.

Q. (By Mr. Swanson): This monolith was taken from this same cut? A. That's right.

Q. And was the monolith marked on the map?

A. Yes, I believe Mr. Smith marked it. It would be in the lower corner of Section 29. I should correct myself. It would be in the northeast corner of 29. [649]

Q. Will you come up and mark it?

A. Mr. Smith marked it right in here, right in the corner of the section, kind of on a flat ridge with a gentle slope.

Mr. Swanson: I offer No. 67.

Mr. Hull: No objection.

The Court: It will be admitted.

(Testimony of D. Everett Phillips.)

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 67.)

The Clerk: Your Honor, I have marked Exhibits 67 through 86.

The Court: 68.

The Clerk: 68 through 86.

The Court: All right.

Mr. Swanson: May I have them.

Q. I show you No. 68. What does that show?

A. That is the remnants of an irrigation pump that was used prior to our time of ownership. It is still laying there, kind of hidden in the bushes. It is on the Bailey place near the creek, just west of the Bailey buildings about a quarter of a mile.

Q. Is that typical or not typical growth on that picture?

A. That is typical brush land and grass land along the [650] creek bottoms. It is quite typical along the creeks and the canyon bottoms. It not only provides forage, it provides shade in the summer and an excellent windbreak in the wintertime. If there is a similar day like today and the wind with it, if the cattle need shelter, they can get in that brush and in the ditches and one thing another out of the wind. It is a definite advantage over a flat country.

Q. Now, do cattle eat solely the bunch grass that we saw on the range?

A. Oh, no, not at all. Cattle are just like a human, they need a variety in their diet. They eat

(Testimony of D. Everett Phillips.)

different grasses at different times of the season. They not only like straight grass, they like a certain amount of browse and brush. Especially in the wintertime, they eat the leaves off of that sage. Some areas of the country, the cattle are wintered solely on sage brush with a little cotton cake pellet supplement.

Mr. Swanson: I offer No. 68, having been identified.

Q. I will ask you how many water holes are on the ranch, approximately?

Mr. Hull: No objection to 68.

The Court: It will be admitted. [651]

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 68.)

A. Oh, approximately around 70 springs. That number was arrived at by the government appraisers. Mr. Conner marked about that many on one of our maps. In addition, there is intermittent running water in four creeks, four canyons, and there are seven reservoirs or dams on the ranch.

Q. Now, are your springs solely confined to the gullies and the draws, or on this ranch do you find springs at higher elevations?

A. Yes, there are a number of springs at higher elevation, which adds to the usability of the grass at the higher elevation. If there was just water in the creek bottoms, it would be an almost impossible task to keep the cattle up on the higher ground, but where there is water they will go along the

(Testimony of D. Everett Phillips.)

sidehill pretty much on a level plain from their feed to the water and stay on the high ground with very little trouble.

Q. And does that show at this time of the year that it is or is not year around water holes on the tops of the ridges?

A. Oh, yes, you bet. There are even evidences of stock [652] trails where they have traversed along the sidehills to the water holes, springs.

Mr. Swanson: Now I will, with your Honor's permission, take a little liberty. I am going to have the witness look at pictures showing a number of these springs and offer them as a group so as to save time, rather than one.

Q. Will you identify——

The Court: You may do that, with the understanding that Mr. Hull, if he cares to, can question about them on voir dire before they are admitted.

Q. (By Mr. Swanson): Will you go through those, naming the number and identifying each as you go along? A. This is——

Q. No. 69 is?

A. This is No. 69. It shows our fish pond spring after it was drained by the Army.

Q. No. 70.

Mr. Hull: Where is it located?

A. It is located just east—it would be in Section 14 just east of the Coffin buildings. This shows the Bailey buildings.

Q. (By Mr. Swanson): Being No. 70?

A. No. 70. Some grass and sage brush in the

(Testimony of D. Everett Phillips.)

foreground and grain land in the background. [653]

No. 71 show buffalo wallow, some grass and brush in the background.

Q. Is that water year around water in that wallow?

A. Yes. It was sufficient water that it was never developed. It is an odd situation, it is just like a drinking fountain, it is full all the time year around.

Mr. Hull: Would you locate it, please, counsel, on each?

Mr. Swanson: Yes.

Q. Where is that?

A. That is in Section 28 on the Rothrock side.

Q. On the Rothrock side, 28?

A. This is the remnants of an irrigation flume that the Baileys had used to irrigate their alfalfa.

Q. On what ranch?

A. It is on the Bailey Ranch in Section 18, Exhibit 73.

The Court: Well, let's see, 73. What was 72? 72 was the buffalo wallow, wasn't it?

Mr. Swanson: We have missed 72 here. It is out of order.

Mr. Hull: 72 is here.

The Court: Counsel wanted to keep 72 out. Oh, I see, that confused me. Buffalo wallow was 72, then, is it, instead of 71?

Mr. Swanson: Buffalo wallow is 71. Counsel has [654] 72 he is holding out.

The Court: Oh.

(Testimony of D. Everett Phillips.)

Mr. Swanson: Temporarily.

The Court: I see. Now you are going on 73 here?

Mr. Swanson: 73 is done, we are now going on 74. 72 is the old irrigation flume.

The Court: All right, all right.

A. 72 is a well west of the Coffin buildings. It shows a pump and pipe in the well. It is in Section 17.

Q. (By Mr. Swanson): Since you have left the premises, the guarding fences there, have they been disturbed?

A. Yes, they have been pretty much destroyed.

Q. What shows here as fencing, is it or is it not in the same condition as when the Army took this property?

A. No, it is in different condition now than it was at the time the picture was taken.

A. This is——

Q. No. 75 is?

A. No. 75 is a picture of a spring development in the upper Sourdough Canyon about a quarter of a mile above where the road crosses the canyon.

Q. In Section 26 or 27? A. In Section 26.

Q. 26.

A. Exhibit 76 shows a spring over on the north end of the [655] range in Alkali Canyon in Section 5 up at the top of the picture.

Q. Is that or is it not a year around spring?

A. That is a year around spring, yes.

Q. In Section 5.

(Testimony of D. Everett Phillips.)

A. Exhibit 77 is a picture of Buffalo Springs, showing the developed spring with the trough.

Q. Have you testified where that is on the map?

A. That is right near buffalo wallow. It is in Section 28.

Q. 28.

A. Exhibit 78 shows water in Cold Creek at the lower end of what is now being farmed in Section 20 on the east of the Bailey buildings about a mile.

Q. What does the foreground and the background of No. 78 show?

A. It shows some forage, some grass in the foreground and brush and grass in the background.

No. 79 is a water hole, a spring in Sourdough Canyon near a sheep camp. It is shaded to where about all you can see is the ripple that the horse is making while he is drinking.

Q. Sourdough Canyon is in?

A. In 29. It is about a mile up from the river.

Q. 29. [656]

A. Exhibit 80 shows a spring on the west end of the Coffin holdings.

Q. About where? A. It is right on the line.

Q. Right on the line. How high ground, about what elevation?

A. Oh, I would judge about 2,500 to 2,600 feet.

No. 81, Exhibit 81, is Alkali Canyon, showing the running water. It is in Section 9.

Q. 9.

A. Shows some trees that I mentioned that the

(Testimony of D. Everett Phillips.)

cattle seek for shade in the summer and also for winter protection.

Q. Does it show three horsemen whose horses are drinking?

A. Yes, it shows three horses strung out there.

Q. Who is the character on the second horse?

A. That character is his nibs, Mr. Swanson.

Mr. Swanson: I am going to offer, your Honor, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80 and 81.

Mr. Hull: May I ask just a couple of questions?

Mr. Swanson: Yes, certainly.

The Court: Yes, all right.

Mr. Hull: Did you take all these?

A. I didn't take those. I was present when they were taken. [657]

Mr. Hull: You were present when they were taken. And when were they taken?

A. They were taken the last few days in the first of June and the first few days of July of '54.

Mr. Hull: Of '54?

A. Yes.

Mr. Hull: Thank you. Who did take the photographs?

A. Mr. Urquhart. He will be on later.

Mr. Hull: I have no objection to the numbers.

The Court: They will be admitted, then.

(Whereupon, the said photographs were admitted in evidence as Defendants' Exhibits Nos. 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80 and 81.)

Mr. Swanson: May I suggest that the witnesses

(Testimony of D. Everett Phillips.)

pass them along as soon as they have seen them? There are so many.

The Court: The jurors, you mean?

Mr. Swanson: I mean the jurors, pass them along.

The Court: Yes, I think they are doing that. If you will just pass each one as you have looked at it, it will save time.

Mr. Swanson: Your Honor, I think, if your Honor please, that we should, in order that the jurors may see these pictures, suspend for five minutes of questioning [658] while they go through them or until they are through.

The Court: Well, all right.

Mr. Swanson: Your Honor, Identification No. 72 is yet another spring is shown, but the character in the picture is shown pouring water from a can and counsel objects to that because of the fact that it may be a demonstration. I am afraid he might be right and I believe we better not offer it, although I will leave it in the record.

Mr. Hull: My position is that any picture that counsel offers which fairly depicts physical attributes of the place, he may put in, but anything that goes beyond that would be contrary to the rules of evidence.

The Court: May I see it, please?

(Exhibit handed to Court.)

Yes. Well, you are withdrawing it?

Mr. Swanson: I will leave it as an exhibit, but not offer it, your Honor.

(Testimony of D. Everett Phillips.)

The Court: Yes, all right.

Q. (By Mr. Swanson): Now, what does No. 82 show?

A. 82 shows a perspective from the hill looking north toward the river. You can see the gap and Saddle Mountain in the background where the river comes through at Beverly and also the road that connects our ranch. We call it the switchback road, the road that the jury [659] rode down. Right in the bottom of the picture it shows some grass and some horses, saddle horses, going down the switchback.

Q. How far in the distance does this ranch extend in that panorama?

A. Oh, about eight to ten miles off in the distance.

Mr. Swanson: Have you seen this? I offer No. 82.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 82.)

A. No. 83 shows the running water in Alkali Canyon, some more brush protection that I mentioned, and some flowers and forage growth in the foreground.

Mr. Swanson: I offer No. 83.

Mr. Hull: I take it these were all taken by the same person at the same time as you have referred to before?

A. Yes.

Mr. Hull: No objection.

(Testimony of D. Everett Phillips.)

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 83.)

A. No. 84 shows some grass west of the Coffin buildings. It shows some of the native bunch grass. One of the [660] nice things about this ranch was we had no poisonous weeds. There are several different types of forages and grass but no poisonous. We had no problem with cattle eating poisonous weeds and vegetation.

Q. (By Mr. Swanson): This shows what type of growth?

A. That shows bunch grass type.

Q. Does this picture show the value of range land that you had on this ranch?

A. Very definitely.

Mr. Hull: I object to that as calling for a conclusion of the witness.

Mr. Swanson: It doesn't call for a conclusion. He can state what value it was.

The Court: Well, he can point out the advantages of it, rather than draw the conclusion.

Mr. Swanson: Yes, I am not saying that it is valuable; I said does it show the value of this range.

Mr. Hull: That is a conclusion.

The Court: I will sustain the objection. He can point out any advantageous features that he wishes to.

A. It shows the grass growing at enough of a

(Testimony of D. Everett Phillips.)

height that there is very good forage. Even if supposing a snow like this morning happened to fall a few inches, the grass is tall enough, the cattle still have feed and there is still plenty left to where they won't kill it out. [661]

Q. (By Mr. Swanson): What size is the acreage of that type of feed in your ranch, if you know.

A. I would say it was roughly half of the ranch or a little more. Half to two-thirds of the ranch.

Q. Does this show the forage prior to the time that the Army took over?

A. That is on the leasehold, that shows what the grass looked like.

Mr. Swanson: 84, your Honor.

The Court: 84, all right.

Mr. Swanson: I offer No. 84.

Mr. Hull: Where was this taken?

A. That was taken west of the Coffin buildings.

Mr. Hull: West of the Coffin buildings. That would be down in here somewhere or north or south of that (indicating)?

A. No, on west.

Mr. Hull: Would you show us?

A. What is the description? 17. It would be in this Section 17.

Mr. Hull: In the area you have referred to as potential crop land? A. That's right.

Mr. Hull: And this was taken in '54? [662]

A. Yes, yes.

Mr. Hull: No objection.

The Court: It will be admitted.

(Testimony of D. Everett Phillips.)

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 84.)

Q. (By Mr. Swanson): 84 is on leased range land, is that right?

A. It is on the range that the Army took away under lease, yes.

This Exhibit No. 85 shows the Coffin buildings in the foreground, taken on the hill north looking down, shows the wheat ground and range land in the background.

Q. Now, I notice that the granary is depicted with a roof on it. Is that the condition now?

A. No, the Army has started dismantling it, started to tear it down. Also, the barn is about demolished now.

Q. This picture, then, does it show the present situation at that ranch?

A. No, no, I would say not. It is in considerable state of being wrecked now.

Mr. Swanson: Now 85 I offer.

Mr. Hull: This is part of the Coffin buildings?

Mr. Swanson: Right.

A. Yes, that's right.

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 85.)

Q. (By Mr. Swanson): And this last one?

A. No. 86 shows a typical fence. This happens

(Testimony of D. Everett Phillips.)

to be a horse pasture fence. It shows brush and forage and sage brush in the background.

Q. How many wire fence?

A. 4-wire fence.

Q. Is that typical of cross-fencing or perimeter fencing? A. It is typical of both.

Mr. Hull: Where located?

Q. (By Mr. Swanson): Oh, yes, where is this located?

A. This is located where the jury ate lunch. It would be in Section 14 where we call it the hole in the wall.

Q. On the Rothrock range? A. Yes.

Q. Did you have cross-fencing in the Rothrock range, as well as the Coffin range? Is that what your testimony is?

A. No, there was no cross-fencing. That was the horse [664] pasture fence on the Rothrock.

Q. That is what I wanted.

A. We controlled them by horse and rider on the Rothrock.

Q. Now, is there a difference in the appearance of this range in October and in July and in the spring?

A. Yes, naturally, there is in any range country, and in the spring it all greens up, the grass starts its growth. The lower elevations start to dry up and turn brown along in June. The higher country doesn't dry up until, depending on whether it is north or south slope, the north slope stuff won't dry up normally, turn brown, until along in late

(Testimony of D. Everett Phillips.)

July, depending on the season, and, of course, in the fall it is all dry, dry grass. It depends on the season, of course, as to the growth. It is hard to plan too many years in advance whether your grass is going to be a foot tall or eight inches tall at a certain stage of the year. The seasons have a lot to do with it.

The Clerk: I have marked 86 through 94 for identification.

Mr. Swanson: Where is 86?

The Clerk: 87, I should have said.

The Court: 86 is in evidence. 87 through 94?

The Clerk: Yes, through 94.

Q. (By Mr. Swanson): I show you these pictures. Are they [665] or are they not different negatives than any pictures that have been shown?

A. Yes, yes, they were taken by a different person with a different camera.

Q. I show you No. 87. What is that?

A. 87 is one of the higher springs at the base of the Umtanum Ridge. We call this one Mud Springs. It was fenced to keep the stock out and had a trough in it similar to the Buffalo Springs. The springs were very similar. Run the year around, run a good stream of water.

Q. What was the trough made out of?

A. The trough was a steel trough.

Q. Did you have more than one steel trough spring?

A. Oh, yes, yes, we had troughs in several springs, eight to a dozen.

(Testimony of D. Everett Phillips.)

Q. Were they standardized troughs?

A. Yes, regular troughs.

Mr. Swanson: I offer No. 87.

Mr. Hull: Who took this series of pictures and when?

A. I took them.

Mr. Hull: When did you take them, sir?

A. At the same time, the latter part of June and the first part of July in '54. [666]

Mr. Hull: And No. 87 is located where?

A. It is located on the Rothrock side, Section 31. It is in this section (indicating). It would be roughly right north of the center of the section.

Mr. Hull: I have no objection to No. 87. It may be noted I am not putting any limit on the number of pictures.

Mr. Swanson: No, I don't think you have a right to. I think the Court has that to do.

Mr. Hull: We went into that a few days ago. I don't know if these are merely cumulative or what.

Mr. Swanson: They are not.

Mr. Hull: But I think they should come to an end pretty soon.

The Court: We will discuss that sometime in the absence of the jury here. How many more pictures do you have, Mr. Swanson?

Mr. Swanson: I have about 10 more pictures.

The Court: All right.

Q. (By Mr. Swanson): Would you state at

(Testimony of D. Everett Phillips.)

what elevation you state is the year around spring? What elevation in that section is that?

A. It is quite high.

Q. Can you say from the map?

A. Yes, it would be about 1,500 feet, roughly, 15 to 1,600 feet elevation. [667]

Mr. Swanson: I offer No. 87. It has been admitted?

The Court: It has been admitted.

Mr. Swanson: I'm sorry.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 87.)

Q. I show you No. 88.

A. 88 shows a typical sidehill, yet it shows grass forage, grass cover. Even though it is on a sidehill and quite steep, it has excellent grass, very good cattle feed.

Q. Was that taken before the Army took over? What date?

A. This was taken at the same time, taken in June and July of '54.

The Court: And where, what location?

A. It would be on the Rothrock. It would be in Section 9 on the Rothrock.

Q. (By Mr. Swanson): In Section 9.

Mr. Hull: No objection to 88.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 88.)

(Testimony of D. Everett Phillips.)

Q. (By Mr. Swanson): 89. [668]

A. 89 shows buffalo wallow and shows that there is still some green grass left at that time of the year.

Q. Now, at this point, this is a picture depicting the color at that time? A. Yes.

Q. Is there another picture uncolored here of buffalo wallow?

A. There is another picture taken by the other man.

Q. Would this show the same thing?

A. It would with the exception that this is the realistic picture, this shows the actual grass, what it looked like.

Mr. Swanson: Well, there is no intention to be cumulative here, your Honor. If counsel has no objection, I will introduce this. This is another picture of the same spring. I didn't realize that.

Mr. Hull: It is possible that these colors in your photographs are limited by the limits of color photography? They might not be exactly the same colors as in nature; is that possible?

A. I would say they were very much the natural colors of the range.

Mr. Hull: Did you develop them yourself?

A. Pardon me?

Mr. Hull: Did you develop them or have someone else do that? [669]

A. No, it is regular colored film.

Mr. Hull: Who developed them?

A. Eastman Kodak.

(Testimony of D. Everett Phillips.)

Mr. Hull: No objection.

The Court: As I understand it, though, they are not tinted, simply color film that you take?

A. That's right, it is regular colored film.

The Court: Well, that will be admitted, then.

Mr. Swanson: 89.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 89.)

Q. 90.

A. 90 shows Buffalo Spring, shows some tules growing in the spring and the green grass in the foreground, some dry cheat in the background.

Q. You have another picture of Buffalo Springs here? A. Yes.

Mr. Swanson: I will offer that.

A. Another one in black and white from a little different angle.

Mr. Hull: No objection to 90.

The Court: It will be admitted. [670]

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 90.

Q. (By Mr. Swanson): 91 is a picture of what?

A. 91 is a picture of the headquarters, the Coffin buildings, showing the corrals, the large shade trees at the headquarters and a few of the buildings. The trees kind of hide the buildings, though, and a wheat field in the background.

Mr. Swanson: I offer 91.

(Testimony of D. Everett Phillips.)

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 91.)

Q. (By Mr. Swanson): No. 92 is a picture of an automobile as far as I can see. A. No. 92?

Q. No. 92.

A. It shows the fish pond before it was drained by the Army. It shows the body of water.

Q. Didn't you have one negative without the automobile in it?

A. No, I don't even recall. That one wasn't taken at the same date, incidentally. That was taken in the [671] wintertime. You see, the trees have no leaves on them.

Q. Well, counsel is entitled to know when this was taken.

A. I would judge in December.

Q. Who was it taken by?

A. I believe my brother took it. I am sitting in the pickup. I believe my brother took that with my camera.

Q. You were present?

A. I am in the pickup, yes.

Mr. Swanson: I offer No. 92.

Mr. Hull: That was last December, you mean?

A. No, that was in December of '53.

Mr. Hull: Of '53?

A. We were down checking on the stock, on the wheat.

(Testimony of D. Everett Phillips.)

Mr. Hull: Well, it is cumulative.

Mr. Swanson: No, it is not. That is another picture of another situation. This one is not cumulative.

Mr. Hull: Where is that located?

The Court: What is it of?

Mr. Swanson: This is of the winter storage of water, your Honor.

Mr. Hull: Where is that located, please?

Mr. Swanson: Fish pond.

Q. Yes, locate that. Unfortunately, there is an automobile in there.

A. It would be just east of the Coffin buildings about a [672] quarter of a mile. Kind of an unusual spring but typical for that country. It originates right on high ground, no gulley or anything.

Q. I understand now that this represents, from your testimony, winter storage of water, is that right? A. That's right.

The Court: It will be admitted, then.

Mr. Swanson: I offer No. 92, is that?

The Court: 92. It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 92.)

Q. (By Mr. Swanson): I show you 93.

A. 93 shows the spring that feeds that pond. This was taken when the others were in June or July. It shows the vegetation, the green grass.

Mr. Swanson: No. 93, I offer.

(Testimony of D. Everett Phillips.)

Q. That is the spring——

A. That feeds the fish pond.

Q. What period of the year does that spring run?

A. It runs all year long. It is typical of the year around springs.

Mr. Hull: I take it this wasn't taken in December?

A. No, I mentioned that was taken the same time the rest of them were, June and July. [673]

Mr. Swanson: I offer No. 93.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 93.)

Q. (By Mr. Swanson): Now, the last picture is what?

A. It is a lower portion of Alkali Creek showing the creek still running.

Q. In what section? A. In Section 9.

Mr. Swanson: I offer No. 94.

Q. This is the lower portion of Alkali?

A. Yes, that is where it runs out of our property.

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 94.)

Q. (By Mr. Swanson): Now, Mr. Phillips, you have, have you, one more exhibit here?

(Testimony of D. Everett Phillips.)

Mr. Swanson: Was this marked?

The Clerk: Not yet.

Q. (By Mr. Swanson): Would you come down and undo this? A. Undress it?

The Court: Well, it is time for the morning recess. [674] I will excuse the jury for the morning recess, then you can unwrap it while they are resting.

A Juror: We haven't finished with the pictures yet.

The Court: All right, I will wait until you finish with the pictures, then I will recess.

Q. (By Mr. Swanson): Are they one exhibit?

A. They are one exhibit.

The Court: You can mark them both the same number, then.

The Clerk: Defendants' Exhibit No. 95.

The Court: All right. All right, are all the pictures through now, gentlemen?

You may retire then for the morning recess.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: Yes, the Clerk has put a tag on each one, but it bears the same number so that they are the same exhibit.

You may remain down from the stand, Mr. Phillips.

I might say as to this question of number of photographs, I have never been confronted with the necessity of placing a limitation. Of course, there would be some point where the Court would have to

(Testimony of D. Everett Phillips.)
say this is enough, you can't put in any more photographs, but I do call attention [675] to this fact, that I think the Court should be somewhat liberal, as I have been, in a case of this kind where the taking of the property was, of course, leasehold here in 1950 and the fee, I think, in February, 1954. Considerable time has elapsed and the jury has seen the property now in the fall when I think the Court could almost take judicial notice that the forage is not what it would be at other seasons. I think that there should be considerable liberality indulged in letting the land owner show by photographs what the conditions of the property was at an earlier time and at a different season of the year.

I had that in mind, Mr. Hull, with reference to this larger number of photographs than would ordinarily be permitted, perhaps.

Mr. Hull: I merely mentioned that because I was limited on the number that I put in. There was an objection made because I was putting in too many in my case in chief and I wanted to call that to counsel's attention. You can carry this on a great degree or limit it, as I did.

Mr. Swanson: Just a minute, there was no objection to too many photographs of the same thing, your Honor, and they were of so-called comparable sales, not of this property. Never has an objection been made to any photograph of this property. It is, after all, over 100 square miles, [676] and if

(Testimony of D. Everett Phillips.)

we had 50 photographs, we would only have one to the half square mile.

The Court: Yes, I understand that, it is an exceptionally large area, and for other reasons that I have stated here I wouldn't be inclined to limit either side. I believe, as Mr. Swanson has stated, the objection came up on photographs of comparable land.

Mr. Hull: That's right, but I see no reason for limiting those severely and not the other. I may request an opportunity to put in more photographs of comparable sales later.

Mr. Swanson: Well, I will object to any more than two or three, which he has more than that of some comparable sales, two or three of each comparable sale or each portion of the property of a comparable sale.

The Court: Of course, we have a little different question there on other lands are brought in merely as an aid in determining market value, usually to show the reason for an expert's opinion of market value, and the sole question is whether there is comparability and the degree of it. Of course, here we have directly involved the question of value and use and highest and best use, and so on, but I understood you to say, Mr. Swanson, that you have only about 10 more here, is that correct?

Mr. Swanson: No, I haven't got 10 more, your Honor, [677] I have got a hundred more, but I am only going to put in, I think, about seven or eight is all.

(Testimony of D. Everett Phillips.)

The Court: Yes, I see. I think we should avoid duplication as much as possible.

Mr. Swanson: Yes, I have tried to do that.

The Court: Court will recess then for ten minutes.

(Whereupon, a short recess was taken, after which the following proceedings were had in the presence of the jury:)

Q. (By Mr. Swanson): Mr. Phillips, Identification No. 95 is one exhibit. It consists of two bunches of growth. Would you describe that to the jury?

A. Yes. Those are some wheat samples that came from the Bailey place from the crop of '54. They are a little bit dilapidated now. I have had them in my basement ever since the harvest of '54. These were taken before the wheat was ripe by me. If I would have waited until it was ripe to take these samples, there wouldn't have been anything left, they would have shattered so badly. They were taken from a north slope about the same time that hay was cut, but the hay was on flatter ground. It was a little riper is the reason for the green color. When this wheat is harvested, combined for grain, it is usually cut fairly high; for example, about where the tag here is is about where the header of [678] the combine would cut it off, and that way not getting any more straw in the combine than necessary, and then the chaff, of course, would be dumped out behind, the chaff being this portion around the kernel and short pieces of the

(Testimony of D. Everett Phillips.)

stem and the leaves, of course, whereas if it is cut for hay, it is cut very low, as low as possible to get that much more forage, that much more tonnage, and it looks quite coarse, cutting it for hay, but where it is chopped into short lengths with a hay chopper, it makes very good forage.

Q. Did you cut your hay in the bale there—I have forgotten the number of it—was that cut down where you indicated, very close to the ground?

A. Reasonably so, yes. We went over that pretty fast, we were limited by a time element. The Army didn't give us too much of a time. Normally, it is cut just as low as you can. We drag the ground with the header, normally, to get all we can.

Q. But did you in the field shown by the pictures that the jury saw, did you drag it on the ground?

A. No, no, it was up, oh, several inches in height. We did that so we could travel the gear faster. We were really working against time. We had only two weeks to do all that in, get the hay and the grain out. We were limited on time. [679]

Q. Now, when you cut this hay to harvest the grains, the kernels, you say you cut it up high. Now, how much forage does that leave? Is there a relative——

A. Well, that leaves a lot of stubble, of course. Cutting it high, just getting the heads and the lower sucker heads, not any more straw than necessary, it leaves a lot of forage on the ground that makes a lot of pasture after it rains and softens up.

(Testimony of D. Everett Phillips.)

Q. If it isn't used for pasture, then does it have some other advantage leaving so much forage on the ground?

A. Yes, if it isn't pastured for the livestock, then it is plowed back into the ground. It helps to build the soil.

Q. Oh, by the way, have you any pictures of production or figures in 1952 or '53?

A. As to wheat production?

Q. Yes.

A. Yes, I believe it was around 14,000 bushel that we harvested in '52 for grain. In '53, it was all in summer fallow, of course.

Q. Well, now, I heard a witness, Mr. Conner, state that he had seen records showing only 13 bushels to the acre. Is there some reason why he could be wrong? If so, explain it.

A. Yes, I would say so. We first plowed the lower end of [680] the Bailey place out in '50, out of the brush, and '51 was the first crop, so we re-cropped part of that in '52 and it wasn't as good as it should have been so we pastured a lot of it. We didn't harvest it all that year. We didn't cut any hay in '52 because we were moving out that fall so we run the cattle in on the wheat we didn't harvest and pastured the grain.

Q. The acres of wheat in weren't reflected in the wheat receipts, then, is that what you mean to say?

A. That's right. The total acreage of wheat land would be an unfair figure to base the yield on, being it wasn't all combined.

(Testimony of D. Everett Phillips.)

Q. And without going into allotments, which is out of this picture, did you have that situation that year? A. Allotments?

Q. Yes? As to the cutting of the entire crop or not?

A. No, the allotment wasn't much of a figure in '52. It didn't get too—it was very nominal.

Q. We are not to discuss allotments in this case by stipulation between counsel and the Court.

A. All right.

Q. Have you arrived at a valuation on your holdings as one of the owners?

A. Yes. We talked it over. By "we"——

Q. Just a minute. Have you arrived at a valuation? The [681] answer is yes or no.

A. Yes.

Q. Now, I am going to divert for a minute.

Mr. Swanson: I offer No. 95, your Honor.

Mr. Hull: That is the wheat?

Mr. Swanson: Yes.

The Court: The wheat.

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said wheat sample was admitted in evidence as Defendants' Exhibit No. 95.)

Mr. Swanson: And I have two other exhibits prior to his testimony.

The Clerk: Defendants' Exhibits 96 and 97.

Q. (By Mr. Swanson): I show you Exhibit No. 96 and ask you what that is?

(Testimony of D. Everett Phillips.)

A. That is a lease on mineral rights.

Q. Was that made and executed prior to the time or subsequent to the time that the government took your property away from you?

A. That's right.

Mr. Hull: If the Court please, I object to any testimony along this line. It is immaterial until we have [682] progressed in our case to a decision on that point. As I understand it, he has an opportunity later to introduce that, if it is found to be admissible.

Mr. Swanson: Your Honor, I will take the position this has nothing to do with our conversation in chambers as to the matters counsel refers to. This is the condition of the title at the time of the taking. This displays it.

Mr. Hull: I take the position, if the Court please, and would like to be heard on it——

The Court: The jury will step out for a moment, please.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: Do you propose to have this witness testify to the value of the mineral rights?

Mr. Swanson: No, sir.

The Court: What is the purpose, then, of putting in this lease at this time?

Mr. Swanson: To show the fact that they did not have the entire ownership, that the fact is that this ownership was encumbered by two leases at the time of the government taking. This is the very

(Testimony of D. Everett Phillips.)

reason the government has to make two more defendants in this case.

Mr. Hull: I challenge counsel to show that that has anything to do with the use of the surface of the property. [683]

Mr. Swanson: If counsel is only taking the surface to the property, why in heaven's name doesn't the government let us try the other at a different time?

The Court: I don't know why, Mr. Swanson, that we agree on things in chambers and then you come out here and do exactly the opposite thing. You do that again and again. You are very, very difficult from a court's standpoint for that reason. You know very well that what I had in mind was that this be brought up at a time when I could rule on it as a matter of law, and yet you insist on sliding it in here to the jury, contrary to our definite understanding in chambers this morning, this very morning.

Mr. Swanson: I disagree with your Honor's premise.

The Court: A lawyer has a duty to his client, but he also has a duty to the Court to have some consideration for agreements that are made in chambers.

Mr. Swanson: Your Honor, if your Honor please, I have made no agreement in chambers or any place else that I would not show the actual facts of this case, which are the condition of the title. As to value of mineral rights, I haven't pur-

(Testimony of D. Everett Phillips.)

ported to say that this witness will testify to it. It is just he is one of the witnesses that signed something that affects his title. If he gets off this stand, I can't do it again. [684]

The Court: All right, if this is admitted in evidence, it is entitled to be read to the jury and to be sent with them to the jury room, and the agreement was that they would not be offered until the Court had ruled on the offer of proof.

Mr. Swanson: Then, I will offer to present these for your Honor's consideration and you may rule as you choose.

The Court: Well, sustain the objection to their offer or any testimony regarding them at this time, with the understanding that counsel may produce them later in connection with his showing of mineral values.

Mr. Swanson: May I make an offer?

The Court: All right, you may make an offer of proof.

Mr. Hull: May I offer a suggestion, also, that the condition of the title is not an issue for the jury in a condemnation case.

The Court: I had understood not. I think it is for the Court to determine what the relative rights of different interests are and that all we are concerned with now is not the title but the compensation to be paid for the whole value of the land.

Mr. Swanson: I have an offer to make.

The Court: All right, make your offer. [685]

Mr. Swanson: I offer Identifications Nos. 96 and

(Testimony of D. Everett Phillips.)

97. 96 is an option for mineral rights lease which encumbered this title at the time the government took title to this property in February, 1954. I offer the oil and gas lease which was executed by the owners of this property to the Shell Oil Company prior to the time that the government took this property in 1954.

It is the theory of this offer that this jury should find the whole value of everything of this property that is taken—mineral rights, underground, surface and everything else—and that a division later is made between the parties to the lawsuit, all of the defendants.

This witness is on the stand for the last time, he is one of the last of the owners, and I offer these at the last of his testimony as a fact. I have stipulated in chambers that I would not give testimony of value as to these, but the fact of their existence I offer to prove by these two exhibits.

The Court: You may recall the witness, if necessary, to identify the documents later on.

I assume that you are objecting, Mr. Hull?

Mr. Hull: I am, I object. It becomes apparent from counsel's offer that these two documents are submitted for the purpose of proving a value, and it is the position of the government that those documents are not competent [686] evidence to show value of mineral rights or the minerals underground unless there is a foundation laid for them, which we have discussed many times.

I make the further objection on the ground that it is my understanding that no evidence along the

(Testimony of D. Everett Phillips.)

line of gas and oil values or other mineral values was to be offered on either side until the question had been determined on a formal offer of proof.

Mr. Swanson: I, further to clarify my offer, want to state this: I have stipulated that I will not give evidence as to the value of approximately 6,000 acres of mineral rights which are to be mentioned to this jury as out of this case. I have not stipulated, until further agreement with this Court and counsel, that I would not show the entire ownership of the property, which can be divided between the proper defendants after this jury's verdict, whatever proportion is proper. I have no concern——

The Court: Are you through, Mr. Swanson?

Mr. Swanson: Yes, your Honor.

The Court: I take the position that the existence of these prospecting leases becomes material only in the event it is shown that there are mineral right values or minerals of substantial value in the property, and that if there isn't anything shown on which there could be compensation for minerals, the fact that there are mineral leases [687] is immaterial.

So far as the railroad's reservation of rights is concerned, if the Court takes the position that there are no minerals in this land that could be shown of sufficient value to warrant submitting their value to the jury, then it is not necessary to disclose to the jury that there is any reservation so far as the railroad is concerned, but the jury will find the full

(Testimony of D. Everett Phillips.)

value of this property on the basis of what value could be shown there at its highest and best use.

Mr. Swanson: I have one further addition to my offer.

Both of these documents show that there is paid in advance a sum of money and that there is some amount that is attributable to the so-called by the Court prospective or possible value to these oil and gas leases. There is a definite amount of leasehold, be it only for the balance of the year, that this jury it entitled to know, my stipulation to the contrary, whatever it is supposed to be.

The Court: That is not an offer but an argument. The leases will show whether there is compensation paid for them. You have only stated what is shown by the leases and you are offering the leases, so what you are doing is making an argument rather than an offer at this time. [688]

Mr. Swanson: Showing what the offer is.

The Court: I don't care for an extended argument at this time. Complete your offer and I will make my ruling.

Mr. Swanson: The offer, completed, is that there is on these leases as a year to year lease——

The Court: Well, doesn't the lease show what it is? You are offering the lease, I am assumed to know what is in it.

Mr. Swanson: And that based upon these leases, checks are written which have been written for a year in advance, and those are admissible. I was going to keep them out.

(Testimony of D. Everett Phillips.)

The Court: Well, you are offering, then, to show checks as payments that have been made?

Mr. Swanson: In advance.

Mr. Hull: At the time of the taking?

Mr. Swanson: At the time of the taking, yes, your Honor.

Mr. Hull: That line of evidence is also objected to on the ground that it is not competent evidence of subsurface or mineral values without, as I say, the proper foundation under the cases cited.

The Court: Well, what the Court is doing here is simply reserving ruling on this matter until [689] the question can be presented and decided as a question of law, whether the issue of mineral value should go to the jury, and it is perfectly obvious why I wish to have it done in that way, and I will sustain the objection at this time, with the understanding that the defendant land owners have the right to renew their offer at any future time it becomes proper under the Court's theory.

Mr. Swanson: Will you allow an exception, your Honor?

The Court: Well, you don't need an exception. If you read your Rules of Civil Procedure, you need not take an exception. If you feel better to make it, you can make it and it will be put in the record.

The Court may say also that you are taking an inordinate amount of time with this witness. I don't know whether you are concerned, afraid you will run out of witnesses, but don't be concerned on that

(Testimony of D. Everett Phillips.)

score, Mr. Swanson, because if you run out of other witnesses other than your mineral rights experts, I will suspend until we get through until tomorrow morning.

Mr. Swanson: I hadn't appreciated that I was taking too much time and I hadn't intended to. I am almost through with this witness and I have plenty of witnesses, I am not running out of witnesses.

The Court: I see, all right. Bring in the jury.

Mr. Swanson: I understand, your Honor, I am not to mention these two identifications at this time? I will void that remark, we will do it later.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: All right, proceed.

Q. (By Mr. Swanson): Mr. Phillips, have you arrived at a price which is your consideration of the market price of this land at the time it was taken?

A. I have.

Q. And have you divided that price as to classifications of land?

A. Yes, the range land, improved wheat land and potential wheat land.

Q. Speaking first then of the range land, will you testify as to your valuation of the range land?

A. We placed a valuation of $20 an acre on the range land, giving a total of $495,162. On the improved wheat land——

Q. Now, just a minute. I asked about the range land first. In consideration of that, your value of

(Testimony of D. Everett Phillips.)

the range land, did you consider the fact that there is additional ground to be used for forage?

A. Yes. There is the residue of the wheat land to be used. [691]

Q. Now, about the wheat land, have you arrived at a figure on that?

A. Yes, on the 995.5 acres of improved land, we have placed a price of $135 an acre, for a total of $134,402.

Q. Have you a picture of that wheat land that you are so valuing now? A. Yes.

Q. I show you No. 98.

A. 98 shows a picture of the wheat just west of the Coffin buildings in the latter part of June or the first part of July, 1954. It shows the wheat still in the green stage, the dough is just in the kernels.

Q. And what is 99?

A. 99 is a picture of similar wheat at a like time. It is on the Bailey place, a little bit to the east of the Bailey buildings.

The Clerk: I have marked 98 to 104.

Q. (By Mr. Swanson): Now, 98 is at what place and in what section and range?

A. Exhibit 98 is east of the Coffin buildings in the north half of Section 14, 13, 22.

Mr. Swanson: I offer No. 98.

Mr. Hull: That is the first one?

Mr. Swanson: Yes. [692]

Mr. Hull: No objection to 98.

The Court: It will be admitted.

(Testimony of D. Everett Phillips.)

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 98.)

Mr. Hull: I do have an objection to No. 99.

Mr. Swanson: All right.

The Court: If the Court may see it.

Mr. Hull: Because of the perspective and the use of an object at middle distance. The angle of perspective is impossible to determine and therefore it is objected to as not being a true picture.

The Court: Well, I think it may be admitted, objection overruled.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 99.)

Q. (By Mr. Swanson): Now, No. 99 is taken where? Did you identify the place?

A. 99 is taken east of the Bailey Ranch in the north half of Section 20, 13, 23.

Q. 99 is the Bailey Ranch and 98 was what ranch? A. The Coffin Ranch.

Mr. Hull: May I ask here at this point——

Mr. Swanson: Yes, just a minute. [693]

Mr. Hull: ——at what height above ground was the camera held? Did you take that picture yourself? A. Yes.

Mr. Hull: ——at what height above ground was it taken?

A. It was taken with a 35 millimeter camera, it had to be at eye level.

Mr. Hull: At eye level? A. Yes.

(Testimony of D. Everett Phillips.)

The Court: Your eye level, is that? A. Yes.

Mr. Hull: You mean by that that you were standing right on a level with the field?

A. That's right.

Mr. Hull: And taken at this height above ground, then, is that it?

A. Yes, you are, no doubt, familiar with that type of camera. It has to be held against your face, against your cheek.

Mr. Hull: All right, that is all.

Q. (By Mr. Swanson): I show you 100. That is a different view of a different area?

A. Yes. That was taken by another photographer, another camera, and shows another field east of the Bailey buildings in Section 18. [694]

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 100.)

Q. (By Mr. Swanson): Now, in regard to your valuation on the wheat land, have you pictures of the harvest? A. Yes.

Q. I show you 102, 103, 104 and—excuse me, 101 to 104, inclusive.

A. 101 is a picture of some wheat trucks, semis, loading out grain out of our storage on the Coffin building, the metal granary.

Q. That metal granary, where is that situated?

A. It is on the Coffin Ranch.

Q. Is it still there?

(Testimony of D. Everett Phillips.)

A. Portions of it are still there. This picture shows the grain running out of the auger into the truck.

Q. Is the auger a part of the machinery in the building? A. No, no, it was a portable auger.

Q. Portable auger. Is that the manner that you load trucks? Testify to that.

A. Yes, these augers are used quite frequently to load trucks. They are portable and very fast. They move a lot of grain in a short while. [695]

Q. Don't you load your trucks in sacks?

A. No, no, it is all bulk.

Q. The next one is 102.

A. 102 shows two combines harvesting on the east end of the Bailey Ranch in Section 20. Both of these particular combines are pull type, pulled by crawler-type cats.

Q. The next one.

A. 103 shows wheat land on the Bailey Ranch taken on the hill north of the Bailey Ranch over the top of the orchard, showing the wheat ripening on the opposite slope.

No. 104 shows two of the combines, the pull type and the self-propelled, at noon.

Mr. Swanson: I offer 101 to 104, inclusive. These are identifications as to place, your Honor, by name of the ranch. I assume that is close enough.

Mr. Hull: No objection.

The Court: They will be admitted, then.

(Testimony of D. Everett Phillips.)

(Whereupon, the said photographs were admitted in evidence as Defendants' Exhibits Nos. 101 to 104, inclusive.)

Q. (By Mr. Swanson): I show you 98, what is that?

A. Exhibit 97 is a picture of an alfalfa [696] field on the Bailey place on the south half of Section 18, 13, 23.

Q. Is that a different hay field than has been testified to before?

A. Yes, before the hay field was of grain. This is alfalfa.

Q. How many acres do you have in alfalfa?

A. I don't know exactly. Very few.

Mr. Swanson: I offer 97.

The Clerk: What is that number?

Mr. Swanson: 97. I took that out of order.

Mr. Hull: No objection.

The Court: It will be admitted, then. That is 97.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 97.)

Q. (By Mr. Swanson): Now, have you testified as to the value of the improved wheat land?

A. Yes.

Q. Other than the improved wheat land, have you determined how much unimproved wheat land, if any, there is on this ranch?

A. Yes, we have determined there are 2,230 acres of unimproved wheat land on the Rothrock in what we term the basin area, and on the Coffin Cold

(Testimony of D. Everett Phillips.)

Creek side we have determined 5,230 acres, or a total of 820,600 dollars. [697]

Q. What price did you arrive at per acre?

A. We arrived at a $110 per acre amount.

Q. Why the difference of $25 an acre between that land and the improved land?

A. We allowed $15 an acre for railing and plowing and getting the brushland under cultivation and an additional $10 for the allowance on the first crop. Virgin soil being rich in nitrates, nitrogen, the first crop usually burns to a certain amount unless it is an unusually wet year, so we allowed $10 for the lower yield of the first crop.

Q. Now, in the first leasehold taking, being number—you have the number there?

A. No. 452.

Q. No. 452.

A. Consisted of 4,086 and a fraction acres.

Q. That was the blue section on the map, was it not? A. Yes.

Q. I will ask you first if that isolates any other portion of your land?

A. Yes, as has been testified before, it isolated the brown area over on the west. That one mile strip running north and south, it isolated that completely.

Q. What is the damage and severance, if [698] you have connected them, and if you have, state why by reason of that taking in 1950 in January?

A. We lumped them up, that is, lumped the severance and the leasehold. We went on a total

(Testimony of D. Everett Phillips.)

carrying capacity basis and figured it that way, rather than a per acre. It is hard to arrive at a per acre basis. Most all range is leased either by a lump amount or by the animals, so much per head per month. We arrived at a figure basing it on one-eighth of the carrying capacity of the ranch, we arrived at a figure of $22,000 for that leasehold.

In Case No. 488——

Q. Now, just a minute——

The Court: That is annual?

Q. (By Mr. Swanson): That is annual?

A. Yes.

The Court: On an annual basis?

A. On an annual basis.

Q. (By Mr. Swanson): Now, what factors do you take into consideration in making such an amount?

A. We take into consideration the factors that it was of the better part of the range, the higher elevation, and also that it was in the area where the hay land or wheat land was and that the residue or possible residue of the wheat or what harvest makes additional forage. [699]

We figured it on that basis.

Q. Was there some wheat land in this taking?

A. Yes, there was some wheat land in this taking.

Q. As a factor of value, do you consider the current price of wheat per the year?

A. Definitely. Wheat fluctuates. If you are fig-

(Testimony of D. Everett Phillips.)

uring the yield or the take off of a given piece of wheat, the year has something to do with it.

Q. The price during that year?

A. The price during that year was around——

Mr. Hull: I object to that.

Mr. Swanson: No, just a minute, I haven't asked you what the price was.

Q. The price during that year, does it affect your judgment of the value of the land as a factor?

A. Oh, definitely. If the wheat was way down, naturally, if you were renting, you wouldn't pay as much as if the wheat were higher, say 50 cents a bushel higher for comparison.

Q. As a factor of your valuation of the hay land, is the price of hay a consideration?

A. Yes, definitely, hay prices always fluctuate. The hay that you could get off of a given piece of ground valued at $20 an acre wouldn't be worth, the potential ground wouldn't be worth near [700] as much as if you were assured $30 a ton.

Q. Now, I don't know whether I made a stipulation or not, but don't answer this: I am going to ask you what the price of grain as a factor in the valuation of this land was during that year?

The Court: During what year?

Mr. Swanson: During the year 1954, the year of the taking, and also during the year of 1950, the year of this severance.

Mr. Hull: Objected to as being immaterial and improper.

The Court: Sustain the objection.

(Testimony of D. Everett Phillips.)

Mr. Swanson: You may answer.

A. Give the amount?

Q. Give the price of grain during the year.

The Court: I said I sustained the objection.

Mr. Swanson: Oh, I'm sorry, I didn't hear, your Honor.

The Court: Yes, all right.

Mr. Swanson: I'm very sorry.

The Court: All right.

Q. (By Mr. Swanson): I don't mean it as an offense, but for the record I must ask, do you know what the price of hay, wheat hay, was in the year 1950, if it was a factor that you used in pricing your land? A. Yes. [701]

Q. Don't answer this: What was the price?

Mr. Hull: Objection.

The Court: I will sustain the objection.

Q. (By Mr. Swanson): Now, the next case is number what? A. 488.

Q. 488 is the case of the severance on July 1, 1950 of 3,000 and some acres of land. Have you arrived at a figure for leasehold and severance on an annual basis for that case?

A. Yes. That case in question being the one on the extreme west, it was out of our use actually at the same time the first leasehold was. We didn't have access to it. I figured on the same basis of the carrying capacity and arrived at an annual of $18,000.

(Testimony of D. Everett Phillips.)

Q. Now, what carrying capacity rate do you use as a factor?

A. I have used the factor of 2,000 head carrying capacity.

Q. Now, what does 2,000 head mean?

A. 2,000 head of grown animals and their calves.

Q. 2,000 animal units. That is as Mr. Conner testified 1,000, I believe. A. Yes.

Q. You are testifying to the use of the whole ranch, are you, for 2,000 head? [702]

A. Yes.

Q. Is your testimony based on experience?

A. Yes, I have based it on the experience of leasing pasture land, what it costs you roughly per head to lease pasture land.

Q. On what basis are leases made, if there are leases of pasture land in your area?

A. Depending on the location and different factors, it varies.

Q. No, on what basis, per acre or per head per month? A. Per head per month.

Q. What is the value per head per month?

A. Currently, it is $5.

Mr. Hull: I object to that line of testimony. We are getting right back where we were before, it seems to me.

Mr. Swanson: Is counsel——

The Court: I think not.

Mr. Swanson: His witness brought out some of that your Honor.

Mr. Hull: Not any price per head.

(Testimony of D. Everett Phillips.)

The Court: The witness has testified that that is the basis of rental. I think he is permitted, should be permitted. I will overrule the objection.

Mr. Hull: I object to this method of [703] valuation, your Honor. The method of valuation on leasehold, as well as fee, as I understand it, is on the market.

The Court: Well, he has said that the market, the customary lease is by head, so much per month per head.

Mr. Hull: The comparable sales, as a comparable lease basis, is the only one I thought the Court recognized on this type of case.

The Court: It is one, not exclusive. It is one factor, it isn't the only one. I will overrule the objection.

Q. (By Mr. Swanson): On a per head per month basis, have you arrived at your figures?

A. That's right.

Q. Are your figures proportionate to acreage on that basis? A. That's right.

Q. I will ask you on the next case, 762, that is the taking of 6,068 acres in 1952, what is the annual leasehold and severance value of that taking, if you are able to arrive at it?

A. Yes. That consists of a larger taking, a larger block of land. Consequently, it would cut into the total carrying capacity of the ranch more. Figuring on that basis, I arrived at a figure of $30,000 for an annual severance and leasehold. [704]

(Testimony of D. Everett Phillips.)

Q. Is that based upon an actual computation of per head per month at $5?

A. Yes, figuring a base of 2,000 head for the total ranch and the fraction thereof taken away, is what we arrived at.

Q. How many head did you actually run on half the ranch?

A. We actually ran in excess of a thousand head on half of the ranch.

Mr. Swanson: You may inquire. Oh, there is one more thing:

Q. The severance to the remaining—it was green area in the former exhibit—the severance to the remaining acreage that you have, a little end that is left to you not taken by the government, is there any damage to that?

A. Yes. We figured that there would be a $3 an acre damage to what was left based on a $20 asking price, $20 valuation, which would amount to $10,080.

Q. Why do you say it is worth $17 after the taking?

A. Because just south four to five miles, land has sold for around $17 very near the subject matter.

Q. Subject property?

A. Subject property.

Q. And why is it worth $20 an acre connected to the range?

Is there a greater value? [705]

A. It is definitely a valuable portion of the

(Testimony of D. Everett Phillips.)

block in so much it is the winter range, the lower elevation feed for wintertime.

Mr. Swanson: You may inquire.

The Court: I think it is too late to start in on cross-examination now. I will excuse the jury until 1:30.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I always like to inform counsel as accurately as I can the view that the Court takes and what will likely be the instructions so they may govern the introduction of evidence and your arguments accordingly, and this matter of leaseholds, particularly several leaseholds on the same property on which the fee was taken, makes a rather awkward situation and an unusually complex situation, but it is my view and I intend unless counsel can persuade me otherwise to instruct the jury, so far as these leaseholds are concerned, they are to find the cash market value of the leasehold from the standpoint of the government as tenant.

Mr. Swanson: I didn't hear the word?

The Court: From the standpoint of the government as tenant, the value of the leasehold to the tenant at the time of taking. That is to be governed in each case as of the time of taking. [706]

I appreciate the fact that these leaseholds contained a provision that they could be renewed annually, giving notice, for almost an indefinite period, that is, for the emergency plus some additional time, and in many cases these leases or leases

(Testimony of D. Everett Phillips.)

similar to this did run for a great many years, but I don't think that that would affect the amount of compensation that a jury should find or that the jury should have to be called in annually to reassess the rental value. I think these leases, regardless of how long they may have run by their terms, considering the power or the right of renewal, that the value we are to find now is on no different basis than if we had by some miraculous procedure been able to call a jury in here the day after the government took these leaseholds and had the jury at that time find the value.

And this matter of price, if there is to be any influence on market prices of wheat and hay, I think it would be in the years preceding rather than the years following the date of taking, because how could two hypothetical persons, a buyer and a seller, getting together on the day of taking, how could they take into consideration what the price of hay or what was going to be a year from then? That doesn't——

Mr. Swanson: I am ashamed of myself.

The Court: Court will recess now until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 o'clock p.m., this date.)

1:30 o'clock p.m., Wednesday, November 2, 1955.

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had in the presence of the jury:)

(Testimony of D. Everett Phillips.)

The Court: Will counsel step up to the bench just a moment, please.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury before the bench:)

The Court: I intended to mention this just before we recessed, but overlooked it. Mr. Granger now has two No. 97's. He marked one, the oil lease, 97. Would there be any objection to changing, crossing this out and make it 105?

Mr. Swanson: He explained that to me. It is satisfactory to us. [708]

Mr. Hull: Yes, that is proper.

Mr. Swanson: 97, the picture of the alfalfa land, is changed in number to Exhibit No. 105, is that agreeable, counsel?

Mr. Hull: Yes.

The Court: It will stand admitted, then, as such.

(Whereupon, the photograph formerly and admitted as Defendants' Exhibit No. 97 was marked and admitted as Defendants' Exhibit No. 105.)

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: All right, proceed.

Cross Examination

By Mr. Hull:

Q. Mr. Phillips, yesterday you were referring to this Map No. 54 with reference to crop lands which had been broken out prior to the date of taking, de-

(Testimony of D. Everett Phillips.)

scribing the fields. I wonder if you would now take a crayon and mark those crop lands on this map as best you can?

A. They will be pretty rough. (Drawing on map.)

Q. Were there any west of Section 10 at all?

A. No, Section 10 was the westernmost.

Q. Farther west. Then you have marked out on Map 54 your [709] best recollection, using blue crayon, of the crop lands which were actually under cultivation? A. That's right.

Q. As of the date of taking. Thank you.

Now, I don't recall the number of the photograph, I think it was in the early 70's, a picture of an old irrigation flume. Is this No. 73 the irrigation flume that you spoke of?

A. It is the remnants of it, the flume and the old pipe, yes.

Mr. Swanson: Will you speak louder, please, so they can all hear you?

Q. (By Mr. Hull): What was the circumstance with reference to this irrigation flume? Was it in use for irrigation during any time that you occupied the ranch?

A. Yes, Bailey, the former owner of the Bailey place, had used it to irrigate in the spring of '49. After the high water washed it out in '50, we never resumed it.

Q. You did not use it for irrigation purposes?

A. Not—no, we didn't ourselves.

(Testimony of D. Everett Phillips.)

Q. You had no land under irrigation, as I understand it? A. That's right.

Q. With reference to the springs or water sources, particularly above the elevation of, say, 2,500 feet along Umtanum Ridge, were there more on the north side [710] or the south side of that ridge? A. Above 2,500?

Q. Yes?

A. Pretty close to the same, I would say, maybe perhaps a few more on the north.

Q. Could you give any proportion on that from your recollection?

A. No, they would balance off pretty well, one off against the other.

Q. It is possible, though, there were a few more to the north, would you say?

A. It is possible, yes.

Q. I realize you didn't check that. In your reference to your figure on the carrying capacity of the Phillips-Haggerty Ranch here, the figure you gave, you stated, was based on your experience. Was that your experience with reference to other ownerships?

A. No, on our own ownership.

Q. Was the figure 2,000? A. Yes.

Q. Had you for any year run, actually run, 2,000 head on this place? A. No.

Q. Now, when you computed your leasehold valuations, Mr. Phillips, and the severance in arriving at the three [711] figures that you have given us, take the first Case No. 452, if you recall, that would

(Testimony of D. Everett Phillips.)

be the area taken for lease indicated in blue on one of the earlier maps, how many acres were taken in the lease in that case, if you recall?

A. Something over 4,000, I believe.

Q. And as to how many acres did you then compute severance?

A. As I stated earlier, I didn't use the acres, I used the total potential carrying capacity of the ranch.

Q. Well——

A. And when that portion, roughly, as it was stated by Mr. Conner, the best grass was up at the western end of the range.

Q. My question is just as to the acreage affected by severance?

A. I didn't base it on acreage, I based it on carrying capacity.

Q. Well, as to the first leasehold, then, we have approximately 4,000 acres taken for lease and approximately 36,000 in the entire ownership, was there not? A. Yes.

Q. Then in computing as to severance on the second leasehold, that was about how many acres?

A. Something over 3,000. [712]

Q. And as to what area do you compute your severance, then?

A. As stated before, I based it on the total carrying capacity of the ranch.

Q. Of the entire ranch?

A. Of the total, used that as a base to figure what percentage was taken away.

(Testimony of D. Everett Phillips.)

Q. From the entire ranch?

A. That's right.

Q. As you did the first one? A. Right.

Q. And as to the third lease, that was about how many acres?

A. Something in excess of 6,000.

Q. And how did you compute the severance in that case?

A. Very much the same way, on carrying capacity of the forage.

Q. Of what portion of the ranch? The entire ranch?

A. Using the base figure again of total potential.

Mr. Hull: That is all.

Redirect Examination

By Mr. Swanson:

Q. Why didn't you run 2,000 head on this place, as counsel asked?

A. For two reasons; one, part of it was taken over by [713] lease shortly after we had possession, and the second one, with the Army dragging their guns back and forth through the property from the firing center to Hanford and with the rumors that the Army was going to reactivate everything there, we never did develop it fully.

Q. You have answered how many you did run.

Mr. Swanson: That is all.

Mr. Hull: That is all.

(Witness excused.) [714]

* * * * *

D. EVERETT PHILLIPS

having previously been duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Swanson:

Q. Mr. Phillips, have you severed your mineral rights from your property?

A. Yes, we have.

Q. To a partnership by some name?

A. Yes.

Q. What is the name of that partnership?

A. Regimbal——

Q. No, no, the partnership that you severed?

A. I don't follow you.

Q. Is that a mineral rights deed, that Exhibit No. 120, from Phillips and Haggerty to Phillips and Haggerty and a stranger in the title?

Mr. Hull: What is his name?

Mr. Swanson: His name is Walter Swanson.

A. That's right, they were severed and joined under a separate company, Cold Creek Company.

Q. There is a Cold Creek Company?

A. That's right, Cold Creek Company.

Q. Does that company now own the mineral rights on your range? A. Yes.

Mr. Swanson: I offer No. 120.

Mr. Hull: No. 120 is objected to as being incompetent, immaterial and irrelevant to the issues in this case.

The Court: Well, I will admit it for the sole purpose of consideration by the Court as to the state

(Testimony of D. Everett Phillips.)

of title, but will reserve ruling as to whether it will be submitted to the jury.

(Whereupon, the said deed was admitted in evidence as Defendants' Exhibit No. 120.)

The Court: Let's see, there are some others there.

Mr. Swanson: There are two more I will identify.

And now, the ruling is reserved or——

The Court: It is admitted for the purpose of consideration by the Court as to the title, but as to whether it will be submitted to the jury, ruling will be reserved until later on.

Q. (By Mr. Swanson): I hand you No. 96 for identification. Will you state what that is? [929]

A. That is a lease for the mineral rights.

Q. From what company?

A. From the Gamble Peet Company.

Q. No, from the owners of the mineral rights, who is that?

Mr. Hull: The document speaks for itself, if the Court please.

Mr. Swanson: I have to identify it.

The Court: I think we can identify that as being executed by the owners. I think that is sufficient.

Mr. Swanson: Owners is all right.

Q. To whom?

A. From Phillips and Haggerty and Walter Swanson to Regimbal for the mineral rights.

Q. That is a lease, is it?

A. It is a lease of the mineral rights.

(Testimony of D. Everett Phillips.)

Mr. Swanson: Do you want to see it?

Mr. Hull: Is it a lease or an option?

Mr. Swanson: It speaks for itself. It is an option for a lease, your Honor.

The Court: You make the same objection, Mr. Hull, I assume?

Mr. Hull: I do, your Honor.

The Court: I will make the same ruling as I did on 120. It will be admitted for limited purposes. Ruling will be reserved as to whether it will go to the jury. [930]

(Whereupon, the document was admitted in evidence as Defendants' Exhibit No. 96.)

Q. (By Mr. Swanson): I will hand you No. 97 and ask you what that is?

A. This is also a lease for mineral rights.

Q. From who to who?

A. From the owners, Phillips and Haggerty and Swanson, to the Shell Oil Company.

Q. And what is the date of that?

A. The 7th of November, 1953.

Mr. Swanson: I offer No. 97.

Mr. Hull: Same objection, your Honor.

The Court: Same ruling, it will be admitted for the consideration of the Court at this time; ruling reserved as to whether it goes to the jury.

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit No. 97.)

* * * * *

Mr. Swanson: Now, I have, your Honor, reached the end of the defendants' case except for an offer of proof which we have discussed.

The Court: Very well.

Mr. Hull: Pardon me just a moment.

The Court: Yes, all right.

Mr. Hull: We have no rebuttal.

The Court: All right, I see. I will excuse the jury then at this time.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: There are two ways that this can be done—you can call your witness and progress as far as you can with him and have the objection made and then the offer of proof made in the absence of the jury. However, since this has been discussed several times in chambers, I wondered if we couldn't simply have the offer of proof made, if you are willing to proceed that way, Mr. Swanson.

Mr. Swanson: I am willing to stipulate that it is not necessary for me to put the witness on the stand. I might go too far in your Honor's opinion or mine or [935] counsel, and we can avoid that by not having him put on the stand.

The Court: You have no objection to the record showing that Mr. Swanson's rights are fully preserved by him making this offer of proof in the absence of the jury without putting a witness on in the presence of the jury?

Mr. Hull: Oh, of course.

The Court: And I think, too, if you wish to put

it in that way, you could offer to prove by specific witnesses.

Mr. Swanson: Yes.

The Court: Might make it more specific if you made your offer that way, or you can make it as a whole. It doesn't make any difference to me.

Mr. Hull: May I then say for the clarification of the record that on the part of the government we will not contend that the defendant has waived any right which he might have preserved by putting on the witnesses to whom he will refer.

The Court: I see, all right.

Mr. Swanson: Now, if your Honor please, it is in the evidence in this case, different than some others, this fee that is being taken by the government has been separated by a severance of the mineral rights, that is, the deed to the Cold Creek Company. It is the law that [936] there must be a stranger to the title in order that there may be a severance of the mineral rights from the fee. Thenceforth the mineral rights create and start a separate chain of title from the date of that severance. That separate chain of title which is started is encumbered by two leases, one is an option for a lease, both of which are precedent to the filing of the declaration of taking by the government of the entire ranch. One is an option for a lease and another is an actual lease—I don't have the numbers here now before me—an actual lease to the Shell Oil Company for an amount certain per year, thereby creating this situation:

The necessary defendants in this condemnation are not alone the original owners of the fee, but

they are the owners of the separate title, estate title, of the fee, of the mineral interests, and the owners or any lessees of the mineral interests, as well as any other lessees whose leases are recorded for a period of years, they don't happen to be just the ones in the mineral lease, and there are two of them so they are also defendants in this action—myself, the Shell Oil Company, and the Regimbal who took the option in behalf of another company.

Now, it comes to this position: Do these defendants and additional defendants have a thing of [937] value, having severed their mineral rights and having become defendants in another sense in this lawsuit?

I offer to prove—I feel it is my obligation to present this to your Honor, the law that I have been able to find and I have now found some, with some assistance—I will make my offer to prove first and then I will make my argument, if that is proper.

The Court: Yes, I think that is the logical sequence.

Mr. Swanson: I have here Mr. Valentine of the Shell Oil Company, a geologist——

The Court: What was his name?

Mr. Swanson: Valentine.

The Court: Initials?

Mr. Swanson: I do not have them.

The Court: Well, that is all right.

Mr. Swanson: I will get them for you.

The Court: That is all right. Yes, all right.

Mr. Swanson: He is a working, operating geologist working in the field in charge of geology for

Shell Oil Company for other portions of the state and area, in addition to this portion here. He was in charge of and is familiar with the geology of this particular area.

He will testify that there are several factors which govern the decision whether or not to drill and [938] explore for oil. Those factors can best be heard from his testimony. Drilling for oil can and has been decided upon by major companies with as few as one of the three or four factors. There are more than one of the factors present in the area here, one of which being a source bed and another of which being an anticline area with a closure.

As to the existence of gas or oil in an anticline area with an enclosure with one or more of the other factors present, it is only, whether it is a professor in a college or the highest priced geology man that we can get, is only a guess, and that will be his testimony. Probability and the presence of those factors will be his testimony.

His testimony will also show that he is corroborated and his company organization is corroborated in this finding by the geology departments of—I believe it is five other major companies—Ohio Oil Company, Texas Company, Richfield, Standard, and one more, in addition to Shell; that all of those companies have leased lands in these areas—in this area, in this particular area; that this area does, therefore, constitute an active leasing area of common knowledge among oil people and owners of real estate.

As part of my offer of proof, there is proof in

this case, which is the dealing in reservations of [939] mineral rights, the recent sales of lands that we have mentioned south of this and adjoining this property have all had a reservation of mineral rights in each case.

The next witness will testify not as a geologist, but as what is called a land or lease man. His name is Mr. Beam. He was formerly with the Carter Oil Company, Standard Oil Company, and now is on loan, I believe, to Northern Pacific. His home is in Billings; he has come here to testify. He will testify that persons of ordinary business judgment invest in mineral estates upon which there are leases by major oil companies; that there are companies organized that do only that business of investing in all or a part, such part as they may obtain of the mineral estate underlying the leases of the major oil companies.

Now, my offer of proof is mindful of one factor and that is this: In any major oil company lease, the oil company, your Honor, has the right to cancel the lease, they reserve that right, the first year, the second year, or the third year of the usual ten year lease. Some of them are five year leases.

The Court: That provision is contained in these leases?

Mr. Swanson: In every lease in the whole area.

The Court: I mean the leases in evidence? [940]

Mr. Swanson: And the oil company lease that is in evidence it is in.

The Court: Yes.

Mr. Swanson: In the option for a lease, no, it

isn't. Wait a minute, maybe it is, at that. Yes, it is also in the option for a lease in the form that is just a standard form as appended to the option for lease.

He will testify that there is a value, that those rights have a real value. Where there has been a strike of actual oil or gas, it becomes a very heavy value. In an area which is—let us call this a wildcat area, your Honor, it is only degree, it is far less in value, but nevertheless there is a value to the mineral estate under the geology of a major oil company. He will testify to that and he will testify that there is dealings in such rights in areas similar to this where there has not been a strike of oil.

Now, I believe it my obligation to the Court, after having made my offer of proof, to give the Court the benefit of my authorities.

The Court: Yes, all right. First, Mr. Hull, I think we should know whether you object to the offer of proof or not. I think that is necessary to complete the record. If you make no objection, then, of course, the witnesses will be called to testify.

Mr. Hull: Well, I want to make a record. I do enter an objection to the offers of proof and point out some of the grounds.

The Court: Well, if you will just make your objection for the record at this time and then state the grounds of them, then we will hear the argument later.

Mr. Swanson: Very well.

The Court: First Mr. Swanson, then you may reply.

Mr. Hull: Any of the proffered evidence and all of it is objected to on the grounds that it is entirely incompetent, immaterial and irrelevant, and none of it is a basis upon which court or jury could establish any value upon the mineral rights in this case. I will make my argument later.

The Court: All right. Mr. Swanson, pardon the interruption, I think we should complete the record before you start.

Mr. Swanson: That's right. I think that is proper.

Now with your Honor's indulgence——

The Court: Yes.

Mr. Swanson: ——I will read these citations and I will give you a copy. I have a copy for you.

The question before the Court in this instance is whether if businessmen regularly buy and sell a mineral [942] estate, even though it is entirely speculative as to whether any minerals exist, can it be said that where the right thus to barter and sell is taken away from it by the sovereign, that the owner of the mineral estate is not entitled to just compensation?

Now, even though it is entirely speculative whether there is anything out here, the mineral estate is taken away by the sovereign, is it for nothing, is this Court entitled to say, as a matter of law, "I give you nothing?"

The courts have held in such situations that evidence of the value of such an estate is competent in a condemnation proceeding.

In Securities and Exchange Commission against

Joiner, 133 Federal (2d), 241, which is not a condemnation suit, the court said:

"It is a matter of common knowledge that persons engaged in the oil industry in Texas and elsewhere buy, sell, assign and traffic in oil, gas and mineral leases and particularly those covering land near producing oil or gas wells or wells being drilled."

In Montana Railway Company against Warren, 137 U. S., 348, decided in 1890, the facts were that the [943] railway company brought a condemnation action to take for right of way purposes a mining claim in Silver Bow County, Montana, territory. On appeal the railway company contended that the trial court committed error in admitting evidence as to the value of the mining claim because there was no proof that any minerals existed in the claim. The Supreme Court held that such evidence was admissible, saying as follows, and this is the quote:

"There remains for consideration but a single point—that there was admitted in evidence on the trial the opinions of witnesses as to the value of the land, which were not based upon the sale of the same or similar property, and were not, therefore, the opinions of persons competent to so testify. It appears that the land taken was a strip running through a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim, which had been developed and worked, and demonstrated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that

[944] possibly, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip taken ran lengthwise through the claim; and, upon the trial, witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony; but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, which may be called 'only a prospect', had a value fairly denominated a market value, may, as the Supreme Court of Montana says, be affirmed from the fact that such 'prospects' are the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such 'prospects' has a market value; and [945] the absence of certainty is not a matter of which the Railroad Company can take advantage, when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the Railroad Company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities."

Eagle Lake Improvement Company vs. United States, Fifth Circuit, 141 Federal (2d), 562. You don't need to write these down. This was a condemnation of a mineral leasehold estate for Navy

purposes in Texas. Mineral leasehold estate. Both the condemnation commissioners, and later a jury, held that the leasehold was valueless. Appellant's principal contention was that the charge of the court erroneously stated the law applicable to the issue of mineral value and was misleading, contradictory and prejudicial. In holding that this instruction was reversible error, the Court of Appeals said—this is the Fifth Circuit—I am now quoting:

"The instructions to which objection [946] was made in substance charged that the jury should find the mineral interests valueless unless from the evidence it was believed that a reasonable probability existed that oil or gas in paying quantities might be produced. As held in Olson vs. United States, 292 U. S.,——"

not reading that part——

"Elements affecting value that depend upon occurrences which, though possible, are not reasonably probable, should be excluded from consideration as too speculative and conjectural to afford a basis for the judicial ascertainment of value. In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights [947] are a common subject of barter and sale, and therefore have a definite, as-

certainable market value, even where the prospects of successful development are too speculative and remote to be 'reasonably probable'. In any event, such leases have a nominal value. The mineral leaseholds here involved are immediately adjacent to a currently productive oil field. Whether or not that field is a domal structure the probable limits of which have been determined by exploration to reach to but not beyond the boundaries of the condemned lands, if the uncertainties are such that the mineral interests in the condemned lands are bought and sold in arms-length transactions for a valuable consideration, they have a market price translative into a fair market value for condemnation purposes. The charge of the court did not correctly state the law applicable to the issue presented, and was prejudicial to the rights of appellants. The judgment is reversed [948] and the cause remanded."

In Southern Pacific Railroad Company against San Francisco Savings Union, 79 Pacific, 961, there was involved condemnation by the railroad for a right of way through a territory in California in which were known oil deposits. The question before the Supreme Court of California was as to the proper measure of value in such a case. Under the law of California the railroad would ordinarily acquire only an easement for right of way purposes. The railroad company therefore claimed that it had the right to show the mineral value which should be deducted from the full value since it would not get the mineral estate. The lower court held as a matter of law that in condemning a right of way over this

strip, which was part of a larger tract of oil-bearing land, there could be no difference in value between the easement and the fee and, over plaintiff's objections, permitted defendants to address their evidence solely to the value of the fee and instructed the jury that the defendants were entitled to have an award to that extent. The Supreme Court held that this was reversible error and that the railroad company was entitled to submit evidence as to the value of the mineral reservation, that is, in depreciation of what they must pay:

"If this reservation is of no benefit, [949] then, as a matter of course, the condemning party must pay for the easement whatever the value of the fee is ascertained to be. If, however, there is a beneficial ownership in the oils underlying the right of way, as these are reserved to the owner of the fee, the value of this beneficial ownership must be taken into consideration as something separate and apart from the value of the easement, and the value of the easement alone assessed against the condemning party. As in condemnation proceedings only an easement is acquired, this is all that the law requires shall be paid for. We discover no reason why the rule pertaining to the determination of the value of an easement, which is adopted with reference to mineral lands, where the minerals are in situ, should not be applied to easements over oil-bearing lands. In principle there is no distinction, though as to oil lands the practical application of the rule may be more difficult. It no doubt will always [950] be more difficult to prove whether a reserved right in

oil is valuable or not, much more so than such a right in fixed minerals; but it cannot be said to be impossible to do it."

Now that, your Honor, is the extent of our examination into the law, which we think could be helpful to you. I am giving the copy of my argument to counsel, too.

The Court: Yes, all right.

Mr. Hull: May it please the Court——

The Court: It is time for recess. If you prefer, I can take a 10 minute recess and give you a chance to look over Mr. Swanson's argument a few minutes.

Mr. Hull: Memorize it.

The Court: Court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

The Court: All right, Mr. Hull.

Mr. Hull: If the Court please, counsel, if I may I would like to add one further ground for my objection.

The Court: All right.

Mr. Hull: And that is the evidence proffered is speculative and therefore inadmissible.

The Court: All right.

Mr. Hull: Specifically with reference to the three [951] documents offered, I would like to point out also that the option for lease to Regimbal would be of no value in this case as evidence for the reason that that document contains in it a condemnation clause, so-called, which terminates the rights of Mr. Regimbal both as to the option and the lease, as I read it, and furthermore that there is filed in this

case a disclaimer and a transfer back of any rights under that instrument by Regimbal to the grantor.

The Court: Is that disclaimer on file here?

Mr. Hull: It has been received and I believe filed.

Mr. Swanson: That is true, your Honor. I think it has been filed.

Mr. Hull: I believe it is in the case record.

The Court: All right.

Mr. Swanson: But that is not the condition of the title at the time of taking.

The Court: Yes, I understand, yes. It was separated at the time of taking, is your point.

Mr. Hull: There is a further ground which I may point out as to the documents proffered, and that is insofar as they have reference to the chain of title as to minerals or the ownership of them at the time of taking, that is not a question for the determination of the jury [952] in this case, any question of value only being for their determination under Rule 71(a).

I point out further that the proffered lease to the Shell Oil Company is terminable by its own terms at any time on notice.

As to the specific evidence proffered, that of Mr. Valentine, which apparently goes into the question only of probability in the minds of persons who might be considering the area as a possibility for exploration, the document of lease itself has been held in many cases, which I have already cited to the Court and which I now again refer to, as being no evidence of value, particularly where there has

been no discovery or development of commercial proportions anywhere in the vicinity; that any such evidence proffered would be entirely speculative in nature as to the possibilities of there being oil or gas here in a completely undeveloped and undiscovered area.

The reservations of mineral rights referred to in the offer of proof are, in themselves, no more evidence, or even less evidence, than these leases. It merely reflects an indication on the part of some owner that he would like to be there if anything happened.

The proffer as to there being active leasing in the area has no more weight than the lease referred to to the Shell Oil Company, where there is no foundation either [953] of discovery or development in the vicinity.

The offer as to the second witness, that people of ordinary business judgment are investing in mineral estates in other areas, I submit, has absolutely nothing to do with this case and it would be wholly immaterial and nothing more than of a speculative nature. Transactions in other areas, whether there is a discovery or not, would have to stand upon their own feet. They certainly would have no probative reference to this case.

Now, the cases cited by counsel, for instance, in this Securities and Exchange case in 133 Federal (2d), I think an inspection of that case, as the brief submitted by counsel indicates, shows it covers land near producing oil or gas wells, which is not the situation here even under any circumstances.

In the Montana railway company case vs. Warren, the Montana mining claim over which the right of way was taken, there we have a situation of a mining claim which was surrounded by proven value areas. As counsel said, it was right next door to the Anaconda properties, and the only question in that case was whether expert witnesses could testify as to what in their judgment was contained in this particular land under condemnation when the claim itself had not yet been worked. We have nothing comparable to this situation and that case is not [954] authority in any sense for the problem that we have here. They said in that case that, since the area was a recognized mining country, claims were being bought and sold and had a definite market value, then it was proper for the witnesses to testify as to their opinions as to this particular claim's value, although it had not yet been worked.

The Eagle Lake case cited by counsel is again based upon a different situation. We have an area where there had been commercial proven values, and furthermore the court refers as a foundation for its opinion to the fact that in Texas and under Texas law a mineral lease is recognized by law as being properly having a market value even if it covers undeveloped territory, and I submit that is not the law in this jurisdiction.

In the Southern Pacific case, again we have property involved which was in the vicinity of known oil deposits.

I am not, of course, going to cite again to the Court the long list of authorities that we have al-

ready submitted, but I do so refer to them for the record.

The Court: Do you have anything further, Mr. Swanson?

Mr. Swanson: No, your Honor.

The Court: This matter of mineral rights has [955] given me considerable trouble and counsel, too, I think, in these cases, particularly since there seems to be an increasing activity here in this area in the way of leases for prospecting for gas and oil, and I had it under consideration and did a lot of sweating over it in the case of Martinez, I believe it was, a year ago, and finally came to the conclusion, after admitting considerable testimony pro and con as to the geology of the subject land and the probability or possibility of striking gas and oil on it, I came to the conclusion that I should withdraw the whole matter from the consideration of the jury and I did so by appropriate instructions.

I appreciate counsel's duty to present this, since it is, as a practical matter, an element of value if you can lease these lands and get at least the first year's rental from it, but after examining counsel's cases and all that I can find and all that counsel have been able to find, I think that the rule that should be applied here is the one that, since I think the Court can almost take judicial notice of the fact that this land is not in or anywhere near a commercially producing mineral area, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for

gas and oil would be too speculative and remote to form the basis for compensation. [956]

And I think that will be my ruling here, that I will not submit this for the jury and will not submit to them the leases which have been received in evidence. They will be here for the purpose of showing the state of the title.

I might say that I don't think the fact that the minerals have been severed, as in some circumstances and for some purposes might have an important bearing, but here we have to keep in mind at all times that this is essentially an action in rem; that the government is taking not a cattle business or not the cattle ranch of the owners Phillips and Haggerty, but is taking this specific land and is obligated to pay for it under the constitutional provision of just compensation on the basis of its highest and best uses, and, obviously, an owner could not increase the amount of compensation that should be received or the government's obligation to pay compensation by splitting title. You could do anything that you could conceive of. You might establish an estate for years with the remainder over and split it up into even splinter ownerships, and yet you wouldn't be entitled, as a matter of law, to one dollar more, because the just compensation would be the market value of the land at the time of taking, the market price of the land in the light of its highest and best uses. [957]

There is this matter that occurs to me: I think it would be extremely dangerous in a case of this kind to submit to the jury the question of whether

or not there is substantial mineral value here and allow them to place an unknown value, a value which we wouldn't know they had placed, when when their verdict came in. If they returned a verdict, as the owners hope they will, of upward of a million dollars, no one could ever tell whether $10 or $500,000 of that was based upon their idea of what these minerals might be worth, and if I should happen to be wrong, which it is my best judgment I would be, if I submitted it, the case would be upset in the Court of Appeals and it would come right back here a couple of years from now and we would start all over again to try this case again at that time. Of course, that is only a sideline observation because the basic responsibility of making these rulings rests on the trial court and that is where I recognize it is and that is where I accept it, and so the ruling is mine, I simply make this other observation as a sort of a sideline comment. [958]

* * * * *

The Court: Gentlemen of the jury, it is almost twelve and it is necessary to run late for lunch, but I think perhaps I should give you my instructions now and let you go to lunch afterwards, because I think it will save time in the long run. You will be ready then to get down to business here on your verdict as soon as you get back from lunch.

I wish it were possible for me just to talk to you a few minutes and let it go at that, but it is the duty of a trial judge in a case of this kind to fully and accurately instruct the jury on the principles

of law that apply and the rules of law that they are to follow in arriving at their verdict, the standards that they are to apply in arriving at the amount to be awarded to the owners, the way of testing the credibility of witnesses, and such as that, and I have to do that in legal language and fully and as accurately as I can. And, for the sake of completeness and accuracy, I have written out most of my instructions, as is usually done by judges. I may comment a little along the [1044] way on the matters I think should be helpful to you, but I try to bear in mind always it is the jury's job to finally determine the facts and my job, primarily, to determine what the law is and tell you about it, and to apply the law during the course of the trial, of course, I have to rule on questions of evidence and rule on law points as they come up. Then at the conclusion of the case, I instruct you on the law that applies, and so far as that instruction on the law is concerned, you are bound by my instructions. It is your duty to take them as correct and to follow them, regardless of what your own opinion might be as to what the law is or ought to be. If I depart from that and comment on the evidence, which a Federal judge has the right to do, you may consider that comment of mine on the facts and the evidence, but you are not bound by it, because it is your primary and sole duty and responsibility to find the facts, and I do not, as a rule, indulge in my privilege of commenting on the evidence to any extent. I think the jury should be left largely to the discharge of

their responsibility of finding the facts. I will comment only to the extent that I think it may be helpful to direct your attention to certain phases of the issues in the case.

Now, the government has brought these four condemnation cases against the defendant landowners and they have been, for convenience, consolidated for the [1045] purpose of trial. However, you are to regard them as separate cases. There is, as you remember, with the successive takings of the leaseholds or the right to use portions of this property, and then finally in 1954 the taking of all of the fee except for 3,000 acres which remains still in the ownership of the defendants.

Now, I think it might be helpful to you, I will refer to the numbers of these cases and give you just a brief description of them to begin with. Case No. 892 involves the taking of the fee title to the 33,213.13 acres of land. The date of taking was February 15, 1954. Now this matter of fee title that you hear so much about, that lawyers and judges talk about, it is a very simple thing. It simply means the entire ownership. When a fee is taken, the government takes all of the title and all the interest in the land that is capable of private ownership, the whole thing. The other three cases which have been referred to in the testimony throughout the trial are the leasehold cases involving the taking by the government of leaseholds; that is to say, the right to exclusive use of the property. Now, such a taking, I may say, is not altogether analogous, but I think a comparison

might be helpful. It places the government in a situation generally similar to that of a tenant and the owner to the position of a landlord or lessor. The three leasehold actions are No. 452, involving the taking [1046] of a leasehold interest in 4,086.69 acres of land on February 10, 1950; Case No. 488, involving the taking of a leasehold interest in 3,034.84 acres on July 5, 1950, and Case No. 762, involving the taking of a leasehold interest in 6,869.22 acres of land on October 28, 1952.

Now, as I will explain more in detail later on, separate verdict forms will be submitted to you in each of these four cases, the one fee case and the three leasehold cases, and you will be asked to return separate verdicts as to each case.

Now, the plaintiff United States — I might say here that these terms may be not so familiar to you, although you gentlemen, I think, have had experience in jury cases before — but plaintiff simply means the government in this case, the defendants means the landowners. The plaintiff United States brought each of these cases against the defendant landowners to acquire the property for public use in connection with what is commonly known as the Yakima Artillery Range project. For the purpose of this case, you are to assume that the taking by the government was authorized and you are not to concern yourselves with the wisdom of the taking and, I might say, with the manner of the taking. You are simply to find the compensation in accordance with the evidence and my instructions here. The government has what is known as the power

of eminent domain, [1047] which means in simple language that it has the right to take private property for public use. In the exercise of that power, it prosecutes a condemnation action in which it acquires the property. The Federal Constitution provides, however, that the government must pay to the owner just compensation for the property taken.

Now, for convenience in these instructions, I shall refer to Case No. 892, involving the taking of the fee ownership, as the fee ownership case, and I shall refer to the other three cases as the leasehold cases.

This term "just compensation" means the full and fair equivalent in money of the property taken. As to the fee ownership case, it is the fair cash market value of the property as of the date of taking and severance damage to the remaining property of the defendants not taken; that is, the 3,000 acres, just in round numbers, that was left. As to the leasehold cases, "just compensation" means the fair cash rental value of the interest acquired by the government in and to the property taken as of the date of the taking, and severance damages to the remainder of the property not taken. I have already stated the date of taking in each of the four cases.

Now, "fair market value" is that sum of money which, considering all the circumstances disclosed by the evidence, could have been obtained for the property in the [1048] open market for cash. It is the amount which in all reasonable probability would have been arrived at by fair negotiations be-

tween an informed owner, willing but not compelled to sell, and an informed buyer, willing but not compelled to purchase. In arriving at the fair market value, you will take into account all of the considerations that would fairly be brought forward and reasonably given weight by well informed men bargaining to fix the price.

In your determination of the market value, you may take into consideration not only the present and past uses or capabilities of the land, but also any use to which it could have been put in the reasonably near future. In other words, you may take into consideration the highest and best potential uses to which the land may be put. An owner is entitled to compensation on the basis of the highest and best use to which the land can be put, regardless of the fact that it has never actually been put to that use in the past.

Now, I think it might make it clearer to simply say that in these cases the action is against the land, not against any particular individual. The government is taking here this land with all of its improvements and with all of its values for its highest and best uses, but it is not condemning a cattle business of any particular person. It is simply taking this land, and what you are to determine is [1049] the cash market value of the land as of the date of taking, what would it have brought in a free and open sale on the open market for cash at the time the government took it. That is the gist of this instruction that I have just given you.

Now, there has been some mention made of min-

eral rights here. I think I should tell you that that question has been carefully considered by the Court and the Court has come to the conclusion as a matter of law, and you are instructed, that there has been shown no substantial value here for mineral rights and you are not to award any value for mineral rights. You are to utterly disregard any evidence that may have come in or any mention of that matter.

Now, you should not consider any unwillingness of the owner to sell the property or have it condemned. The question is not what the property would have been worth to the owner had he retained it because it may possess a greater value to him than it has in the open market. For the same reason, you should not consider the value of the property to the government in determining its market value. The fact that the government needs the property in no way serves to increase its market value, and consideration of that circumstance has no place in your deliberations.

Evidence regarding the sale of other properties has been offered by some of the expert witnesses in giving [1050] you a basis for their opinions as to the market value of the lands with which we are here concerned. You should give consideration to such testimony because, generally speaking, sales of similar property on or about February 15, 1954, the date of taking, furnish the most desirable basis of fixing market value. However, it is for you to determine what sales to which the witnesses testified cover land substantially similar to the land involved

here, and the nearness or remoteness in time and distance of such sales from the time of taking and the location of the defendants' lands and any and all other points of similarity or difference in comparison with defendants' lands should be considered by you in deciding what weight you are to give to such testimony as to the sales of other lands.

Evidence of what the owners paid for this subject property which is under consideration here was introduced and allowed to go to you for that same reason, for your consideration as a comparable sale. It is not binding one way or the other in a case of this kind. If an owner has been able to get a good bargain, he is entitled to the benefit of that bargain. If he has paid too much for the property, the government is not prejudiced by that or not required to pay it and, of course, you should take into consideration any change in value that may be shown by the evidence which you find from the time of the sale to the [1051] owner, or the purchase by the owner, to the date of taking by the government.

Now, in determining the compensation to be allowed the owners of this property for the taking of the fee simple title thereto by the government, you will fix that compensation as of the date of taking, February 15th, 1954, and you will give no consideration to the fact, if it be a fact, that such land has increased in value since the date of taking or to the fact, if it be a fact, that the particular tract has depreciated in value since the date of taking. Compensation to be determined by this jury should

be paid by the government for the taking of these lands is the sum that you would have determined should have been paid had you been trying this case on the 15th day of February, 1954.

Just compensation does not include speculative elements. While property is to be valued with reference to all the uses to which it is adapted, your consideration of possible future uses of the property should not take in future uses which, upon the evidence, you find to be remote, speculative, or uncertain, and in determining just compensation you should not take into consideration any improvement to the premises made by the Army after February 15, 1954, the date of taking.

In determining just compensation to be paid for [1052] the fee simple taking of this land, you are instructed to consider all relevant physical facts for the purpose of arriving at a final figure which in your opinion, based upon all the evidence, will be just compensation for all of the lands which are the subject matter of this litigation. That is to say, this is not to be viewed as separate takings of the range land, cultivated land, potential crop land and improvements, but is to be viewed as the taking of a single piece of property, and your verdict should reflect one figure as the fair cash market value of the property as a whole. In other words, it is your duty to consider all proper facts and circumstances that contribute to make the property valuable, all that detract from it, and finally, weighing all those elements, to determine what is just

compensation for the property that has been taken by the government.

Now, with reference to the leasehold cases, when land is taken for a temporary use, the measure of compensation to be awarded for the use and occupation by the government of the property of the defendants is not the market value of the property, but is the fair cash rental value of the interest acquired by the government in and to the property. The fair rental value is that sum of money which, considering all the circumstances disclosed by the evidence, could have been obtained for the use and occupation of the [1053] lands in question by an informed owner, willing but not compelled to lease, offering to rent them in the open market for cash to an informed tenant, willing but not compelled to rent. In determining the fair rental value, you should not consider the rental value of the property to the government. The fact that the government needs or can use the property in no way serves to increase its fair rental value herein.

In awarding compensation for the use of the land being condemned, you should bear in mind that you are concerned with the reasonable market rental value of the tracts as of the date they were respectively taken, and not any remote, speculative future rental value that the lands might thereafter have.

Now, severance damage, as used in these instructions means simply that when a tract of land which has been used or is capable of being used as a unit for farming and stock raising is severed and part

of it is taken by the government for public use, the owner is entitled to be compensated for any damage that may have been suffered by the portion of the tract left to him by reason of part of it having been taken away. Severance damage in any case is the sum of money by which the market value in the fee case and the rental value in the leasehold cases of the remaining property has been diminished or reduced by reason of its being separated or severed from [1054] that portion of the tract taken for public use.

Fair market value, fair annual rental value and severance damages, if any, as elsewhere defined in these instructions, are not to be determined with reference to the defendants' increased cost of doing business, if any, nor by any inconvenience which may have been caused to them, nor by any loss which they may have sustained or may in the future sustain by reason of reducing the size of their operations.

You are instructed that this action involves only lands owned by defendants themselves. There has been some evidence that the defendants have under lease lands owned by others. The purpose of such evidence was to show availability of these lands for use in connection with the subject property and should not be considered by you for any other purpose. Therefore, no compensation shall be allowed to the defendants with respect to any lands owned by other persons or corporations or by the United States, state, or county but which may have been

leased to the defendants or used or occupied by them in conjunction with their own holdings.

As I have stated, the measure of compensation to be allowed to the defendants in this action is the fair market value and fair rental value, respectively, of the property and severance damages, as elsewhere defined in [1055] these instructions. Past profits or probable future profits that might have been realized from ranching, farming, or other operations conducted upon the land are too speculative and conjectural to furnish any basis for determination of value. You are not permitted to consider such profits in determining the amount of the award which the defendants should receive.

Now, you are the sole judges of what is the evidence in this case, as I have said, and of the credibility and weight to be given to the different witnesses. In weighing the testimony of witnesses, it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring or an inclination to favor any party? Did he appear to be fair and candid or otherwise? Was the testimony reasonable and consistent within itself and with uncontradicted facts?

In judging the credibility of the witnesses in this case, you may believe or you may disbelieve the whole or any part of the testimony of any witness as may be [1056] dictated to you by your judgment as reasonable men. You should carefully scrutinize the testimony given and, in so doing, consider all the circumstances under which the witness testified, including his relation, if any, to the plaintiff or to the defendant, the interest he may have in the case, the manner in which he may be affected by the verdict, and the extent to which he is contradicted or corroborated by other witnesses or other evidence, and every matter that tends reasonably to shed light upon his credibility.

Now, an expert is an individual who, by education, study, training, experience, or observation has acquired special knowledge, skill, or understanding in a particular field beyond that of the average person. Where the witnesses qualify as experts in a particular field and are allowed to express opinions, rather than to testify to facts, those opinions are for the aid and assistance of the jury, but not for the purpose of invading its function. The responsibility to decide rests upon the jury. It is your duty to evaluate and appraise the testimony of a witness who expresses opinion precisely as you would evaluate and appraise the testimony of witnesses who testify to facts within their personal knowledge. The rules for determining the credibility of witnesses which I have given to you in these instructions apply to expert witnesses, as well as [1057] to other witnesses. Now that, gen-

tlemen of the jury, is a particularly important function in this case because the values which have been given here, market values, opinions of market value and opinions of rental value, given by these experts, and it may seem strange to you, as it has to me, the very wide spread that there is between these expert witnesses, who have the appearance of being honest witnesses and witnesses of common integrity. The wide spread has been commented on in argument and, of course, you have it in mind. I think here, for example, according to my figures, and these are only mine now—your own recollection of what the testimony and the evidence is is to govern if it differs from mine—that as to the fee taking, Mr. Conner placed a value of $425,000.00, Mr. Haney, for example, for the defendant, $1,461,000.00 on the fee, and there were not quite so great, but very great differences, too, to the leasehold values. Now, it is for you to place the weight and credit on these different witnesses and arrive at the figure that you think is right and just, and I will not try to invade your functions.

I might point out one or two things that might be of some help to you in this particular, one thing on which the witnesses differed greatly, and it has to do with the value of the range lands, with the carrying capacity. I think the government witnesses testified from 800 to 1,000 [1058] the landowners around 2,000 head, that it would carry. Now, that is a thing which had quite an influence on the spread in the values of the range land, one big difference, and I think perhaps the biggest difference,

is due, it seems to me, to the question of how much potential wheat land there is, how much potential crop land there is, up there. Remember, there isn't a great deal of difference, as you recall, as to what has already been put under cultivation and cropped in the past, around 900 acres, something like that, but Mr. Conner testified, for instance, that there was only, in his judgment, 700 acres of desirable land that hasn't been broken out yet. Based, in considerable part, upon Mr. Smith's testimony, the defendants' witnesses thought that there was about 7,400 acres of potential crop land there, and I think that around $700,000.00 or $800,000.00 was based upon that potential wheat land value. Now, that is a very important point for you to determine, what in your best judgment from the evidence was the amount of potential crop land over and above what has already been broken out.

Another thing, of course, was the difference in the experts as to what was comparable sales and what was comparable property. The defendants' witnesses took Adams County wheat land. The government witnesses say that is not comparable, it shouldn't be compared with this. Now, that made a great deal of difference, so that those [1059] factors, I think, were the ones that were largely responsible for the wide spread in the testimony here of the value experts, and that difference, as I have said, is for you to resolve. I will not express any opinion about it.

Now, in this case, the defendant land owners have testified as to what in their opinion was the market

value and the rental value of the property taken. You will give consideration to such testimony, since, under the law, an owner is qualified and permitted to express an opinion as to the value of his own property when it is taken for public use. You will understand, however, that you are not bound by such an opinion any more than you are bound by the opinion of any other expert witness, and you have a right to take into consideration the interest the defendants may have in the amount of your verdict.

At the opening of the trial, you were taken to view the property involved here. This was done in order that you might better understand the testimony to be given and also to aid you in coming to the correct conclusion as to the just compensation to be awarded to the owners. That which you observed on the view of the property, you should remember as a part of the evidence in the case, having in mind any changes shown by the evidence to have taken place in the property since it was taken by the government. The statements of the witnesses who have testified must be [1060] considered by you, but you are not bound by them if your examination of the property leads you to a different conclusion. That which you saw and that which you have heard from the witnesses should both be duly weighed and considered.

Now, from time to time the attorneys for one or the other parties has interposed objections to evidence. Counsel not only have the right but the duty to make any and all objections which are

deemed advisable and appropriate and no inference or presumption should be indulged in one way or the other because an attorney on either side has made objections. And from time to time I have been called upon to pass on a question of whether certain offered evidence should be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law with which the jury is not concerned. As to any offered evidence that was rejected, you should not consider the same. As to any question to which an objection was sustained, you should not conjecture as to what the answer might have been or the reason for the objection.

Now, if I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either the plaintiff or defendants in this case, [1061] you should not be influenced by that suggestion. I have tried to be strictly impartial and if any action or expression of mine has seemed to indicate the contrary, you are instructed to entirely disregard it. If I have made comment on the evidence regarding the facts in this case, and that applies both to my instructions and otherwise, in the course of the trial, you may consider it, as I have said, but you are not bound by that comment. It is your duty to follow my instructions as to the law, but finding the facts is your sole function and responsibility.

You should not consider as evidence any statement of counsel made during the trial unless the

statement was an admission or a stipulation conceding the existence of a fact or facts.

In arriving at your verdict, it is proper for you to give due consideration to each other's views in your discussion of the issues in the jury room, but you are not permitted to add together different amounts representing the views of individual jurors and then divide the total by twelve or by the number of views represented. The result would be what we call a quotient verdict, which is contrary to law and is not a good verdict.

It is your duty to make every effort to agree, but such common agreement should be based upon the final, honest belief of the jurors and must not be arrived at by [1062] any mechanical process of addition and division, which constitutes a quotient verdict. It would likewise be improper for you to add together the amounts testified by various witnesses to be the market value of the property and then divide the total by the number of witnesses. That wouldn't be a proper method, either.

Now, in your deliberations, it goes without saying, I think, that there is no room for sympathy, sentiment, prejudice or passion. It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, and to decide the issues strictly upon the merits.

Now, when you retire to the jury room to consider your verdict, you will take with you the exhibits which have been admitted in evidence for your consideration in the case and a summary or a

written statement of the testimony of the witnesses, the expert witnesses, as to values on the market value and the rental value of the lands and blank forms of verdict which have been prepared for your convenience.

Now these statements of values, there is one for each of the cases so it will be easier for you to keep from getting these various cases confused. It is difficult and complex, I recognize, but you will find a number on each of the forms of verdict. For instance, in the first one, the fee case, that is 892, No. 892, and that reads, "We, the jury [1063] in the above-entitled cause, find just compensation for the taking of the defendants' property," and then in parentheses—this is to aid you in identifying this—"fee ownership of 32,213.13 acres", including severance damages to the remainder of the defendants' ownership, to be dollar sign blank. When you have agreed, you write in the amount and the foreman signs it. The other three are leaseholds, and they give the numbers, 452, 488, 762, there is one for each case, and in there we have indicated that they are leaseholds. I will just read one of them because they are alike in every respect except the number and the acreage: "We, the jury in the above-entitled cause"—this is No. 452—"We, the jury in the above-entitled cause, find the value of the annual rental and severance damage for the leasehold taken (4,086.68 acres) to be $————."

Now, I might say it has been agreed between the parties and the Court here that, to save you the considerable difficulty and inconvenience of making

calculations as to what the total rental should be in each case, we have arranged these verdicts so that you will find only the annual rental and severance, what was it worth each year, and then after you have returned your verdict, why, at our leisure, the attorneys and I can take a pencil and figure up what the total would be, because the landowner will get rental at this rate you fix for the entire time the government [1064] had it before they took the fee. I don't know whether I make myself clear on that or not. But, here, the government took this 452 in January of '50, I believe it was, January of '50, January or February. Well, say early in 1950 they took this land in 452. Now, all we are asking you to do is a find the annual, by the year, compensation that should be paid to the owner, how much he should get for one year's rental and severance damage. When you have found that, then the attorneys and I later in arriving at the judgment will compute how much that would be for the entire period from February, 1950 until February, 1954, when the property was finally taken in fee by the government. But to make it easier for you, you find only the annual rental and we will figure the rest out afterwards. And these others are the same except for, as I said, the numbers and the acreages.

Now, what the witnesses testified to here, the two government expert witnesses and three defendants' witnesses, we have put their figures down so that you will have them on each of the cases with the number corresponding to the verdict number, and if you want to see what the testimony was in the

fee case, we'll say, 892, look for No. 892 and here it is on this statement. If you want to see what it was on 452, look in this statement, 452, you will find it here on each one of the cases. [1065]

Now, the first thing you should do when you retire is to elect one of your number as foreman and he will be your chairman and preside over your deliberations and then sign the verdicts when you have agreed upon them, and in this case ten of your number may return a verdict. I want you to bear that in mind, because, unless there is some agreement between the attorneys, the whole jury must agree, it must be unanimous, but they have agreed in this case that any ten of you, when you agree, can return a verdict, and when ten of you have agreed, you have to agree on each one of them, of course, ten have to agree on each of the verdicts because they have to be considered separately, and when you have agreed upon these verdicts, why, have the foreman sign them and let the bailiff know that you are ready and then you will be brought back into court to return the verdicts in open court.

Now, I will ask you to step out just a moment. We will have some short proceedings in your absence.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: You gentlemen have had copies of these forms of verdict, have you not?

Mr. Swanson: Yes, your Honor.

The Court: All right, in the absence of the jury,

counsel may take exceptions to the instructions to the jury. [1066]

Mr. Hull: We have none.

Mr. Swanson: I except to the instruction regarding mineral rights, regarding withholding from the jury of any valuation, regarding taking from the jury of the right to find a value to the mineral rights.

That is my only exception, your Honor.

The Court: All right. Well, you may call in the jury if there is nothing else that you think of here that I have overlooked. Well, we will swear the bailiffs after they get back in. [1067]

* * * * *

[Endorsed]: No. 15156. United States Court of Appeals for the Ninth Circuit. R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everett Phillips and Evelyn Phillips, his wife, individually and in behalf of the Cold Creek Company, a partnership, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Eastern District of Washington, Southern Division.

Filed: June 5, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15156

R. H. PHILLIPS, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

The appellants do hereby make the following concise statement of points upon which the appellants intend to rely on the appeal:

1. Rejection of exhibits for identification No. 96 and 97 which are leases to oil companies for mineral exploration for consideration expressed therein, offered as proof of highest and best use of land not inconsistent with agricultural use.

2. Rejection of proffer of proof of rental payments, of the situation of condemned property within the active leasing area of six major oil companies, contractural interest in the geology of the subject property by major oil companies, and offer to prove probability and possibility of oil or gas development and consequent cash market value of owner's mineral rights through competent witnesses (in addition to rental income).

3. Requirement by the trial court that the defendants conduct their case in accordance with the desires of the trial court as to order and manner of proof.

/s/ WALTER V. SWANSON,
Attorney for Appellants.

[Endorsed]: Filed June 16, 1956. Paul P. O'Brien, Clerk.